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TRANSCRIPT OF RECORD

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT.

No. 16,425

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

versus

MRS. WOODROW SAPP, MRS. JAMES H. TYRE and MRS. LEROY BECKHAM, SR.,

Appellees.

Appeals from the United States District Court for the Southern District of Georgia.

(ORIGINAL RECORD RECEIVED DEC. 10/56.)
U. S. COURT OF APPEALS

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COMPLAINT.

Filed 10 A. M., June 4, 1952.

UNITED STATES DISTRICT COURT, THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION.

Civil Action No. 292.

MRS. WOODROW SAPP,

Plaintiff,

versus

ATLANTIC COAST LINE RAILROAD, A Corporation,

Defendant.

1. Plaintiff, Mrs. Woodrow Sapp, is a citizen of the State of Georgia, and resides in Glynn County, Georgia, within the Southern District of Georgia, Brunswick Division thereof.

2. Defendant, Atlantic Coast Line Railroad Company, is a corporation incorporated under the laws of the State of Virginia with an office and place of business within said district and division.

3. Plaintiff and defendant are citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

4. Plaintiff is the mother of Leonard Holmes, deceased.

5. The said Leonard Holmes was 18 years of age at the time of his death on October 25, 1951, had never been married and left no children.

6. Plaintiff was dependent upon the said Leonard Holmes and the latter substantially and materially contributed to plaintiff's support.

7. The said Leonard Holmes, deceased, had a life expectancy of not less than 43.39 years at the time of his death, and the full value of his life at that time, without deduction for necessary or other personal expenses had he lived, was not less than $450.00 a month, or a total of $234,306.00.

8. On the night of October 24, 1951, at about 12:00 o'clock, plaintiff's said son was mortally injured and instantly killed in Glynn County, Georgia, about ten miles north of Brunswick on U. S. Route No. 25, at what is known as Pyles Marsh Crossing, as the result of a collision between a car in which plaintiff's said son was riding as a guest of the driver of said car, namely, Leroy Beckham, Jr., and a freight train belonging to defendant and being operated at the time by the agents and employees of the defendant while in the course of their employment by defendant, said collision and said resulting mortal injuries to and death of deceased having been caused directly and proximately by the negligence of defendant and its said agents and employees.

Wherefore, plaintiff demands judgment against said defendant in the sum of $234,306.00 and costs; plaintiff also demands trial by jury.

E. WAY HIGHSMITH,
(E. Way Highsmith),

Post Office Address:
Brunswick, Georgia.

E. O. BLALOCK,
(E. O. Blalock),

Post Office Address:
Waycross, Georgia.

J. H. H.,
(J. H. Highsmith),

Post Office Address:
Baxley, Georgia.

HIGHSMITH & HIGHSMITH,
(Highsmith & Highsmith),
Attorneys for Plaintiff.

Post Office Address:
Brunswick, Georgia.
Baxley, Georgia.

SUMMONS IN A CIVIL ACTION.

District Court of the United States for the Southern District of Georgia, Brunswick Division.

Civil Action File No. 292.

Mrs. Woodrow Sapp, Plaintiff,

v.

Atlantic Coast Line Railroad, A Corporation, Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon E. Way Highsmith, plaintiff's attorney, whose address Highsmith & Highsmith, Attorneys at Law, Brunswick, Georgia, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day or service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SCOTT A. EDWARDS,
Clerk of Court,
By ROSALIE CROSS,
Deputy Clerk.

(Seal of Court.)

Date: June 5, 1952.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

ANSWER OF DEFENDANT.

Filed Mar. 6, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp, Plaintiff,
vs. Civil Action No. 292.
Atlantic Coast Line Railroad Company, Defendant.

Comes now defendant and makes answer to the complaint as follows:

First Defense.

1. The allegations in paragraphs 1, 2, 3 and 4 are admitted.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 5 and 6.

3. Paragraph 7 is denied.

4. Answering paragraph 8 it is admitted that plaintiff's son was killed when the automobile in which he was riding collided with a freight train of the defendant at the time and place alleged. For want of sufficient information defendant can neither admit nor deny that Leroy Beckham, Jr. was driving said automobile. The remaining allegations in said paragraph are denied.

5. Defendant denies the allegations in paragraph 9 and all subparagraphs thereof.

Second Defense.

Defendant avers that the sole proximate cause of the collision was the gross negligence of Leroy Beckham, Jr. (if he was driving the automobile) in driving the automobile in excess of sixty miles per hour, in violation of the statute of Georgia regulating the speed of automobiles on a public highway; and in driving his automobile at such a rapid rate of speed that he was unable to stop within the vision of his headlights when the train of defendant was observed, or should have been observed by a person exercising ordinary care for his own safety; and in driving his automobile into the side of defendant's train while it was moving across said highway.

Third Defense.

Defendant avers that if plaintiff's son was not driving the automobile, he nevertheless could have observed that said automobile was being driven at an unlawful speed, and at such a speed that it could not be stopped within the vision of the headlights, and his failure to warn the driver amounted to negligence which was the proximate cause of the collision.

Fourth Defense.

Defendant avers that the said Leonard Holmes, by the exercise of ordinary care, could have avoided the consequences of any negligence alleged against the defendant, negligence on the part of defendant, however, being expressly denied.

Fifth Defense.

Defendant further avers that the negligence of Leonard Holmes contributed to the accident complained of.

Sixth Defense.

Defendant further avers that plaintiff made claim against L. R. Beckham, Sr. for alleged growing out of the death of her son, Leonard Holmes, in the collision referred to in this case, and on June 3, 1952, plaintiff was paid the sum of six thousand dollars by the said Beckham in consideration of plaintiff's covenant not to sue the said Beckham, which said sum equals the damages sustained by plaintiff, and amounts to a satisfaction of her claim for such damages. If it does not equal the entire damage sustained by her, any finding of damage in her favor would be reduced by said sum of six thousand dollars.

LARRY E. PEDRICK,
(Larry E. Pedrick),
Attorney for Defendant.

P. O. Box 178,
Waycross, Georgia.

AMENDMENT TO COMPLAINT.

Filed Feb. 25, 1956.

In the United States District Court for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp, Plaintiff,
vs. Civil Action No. 292.
Atlantic Coast Line Railroad Company, a Corporation, Defendant.

Comes Now the Plaintiff, in response to Defendant's Motion for a More Definite Statement with respect to Defendant's acts of negligence, and amends his complaint heretofore filed by adding the following paragraph, to-wit:

9. The killing of Plaintiff's son was the direct and proximate result of the negligent, careless, reckless, wilful, wanton and unlawful acts and omissions, or any one or more of them, or any combination thereof, of the Defendant, its servants, agents and employees, acting in the course and scope of their employment, in the following particulars, among others, to-wit:

(a) In failing and neglecting to exercise due care under the facts and circumstances then and there existing;

(b) In failing and neglecting to keep proper lookout at the time and place and under the facts and circumstances then and there existing;

(c) In failing and neglecting to give any warning whatsoever, or sufficient warning, to persons traveling U. S. Highway 25 of the obstruction of said Highway at the time and place in question.

(d) In failing and neglecting to maintain a watchman, signals, automatic signals, reflectors, gates, cross arms or observable signs or warnings or notice of any kind, or sufficient warnings of proper kind, to northbound vehicular traffic of the existence of a railroad crossing and of a train passing over said crossing at the time and place in question.

(e) In blocking said highway at the time and place in question with dark flat cars without putting out flares or lanterns of any kind, or making any other effort of any kind to warn vehicular traffic of said road block, contrary to law and Defendant's own rules and regulations in such cases made and provided;

(f) In maintaining a dangerous crossing, known by Defendant to be dangerous and the scene of many previous collisions of a similar nature, without any warnings whatsoever to vehicular traffic.

(g) Said Defendant operated a railroad through said county which crosses a public thoroughfare, namely U. S. Route No. 25, in said county, at the time and place of said collision, as aforesaid.

(h) Said Defendant then and there carelessly and negligently maintained and operated its said railroad crossing, and its servants so carelessly and negligently drove said locomotive engine and train as to cause same to collide with great force and violence with the

aforesaid motor vehicle in which Plaintiff's son was riding as a guest.

(i) Said Defendant and its servants, acting in its behalf, then and there performed the duties in which they were engaged in a negligent, careless and reckless manner in that the engineer on such locomotive failed to make the blow post signals as he approached said crossing as required by Sec. 94-506 of the Georgia Code; the engineer on such locomotive failed to keep and maintain a constant and vigilant lookout along the track ahead of such engine, and failed to otherwise exercise due care in approaching such crossing, in order to avoid doing injury to any person or property which may have been on such crossing, or upon the line of said railway at any point within fifty feet of such crossing, contrary to the statute in such cases made and provided as set out in Sec. 94-506 of the Georgia Code.

(j) Said Defendant was negligent in failing to erect at such railroad crossing what is commonly known as the "X" sign, the same being a sign in the form of the letter "X" by boards crossed on an upright post, the boards forming the "X" being not less than 6" wide and 4' in length and painted white, bearing on both sides in black painted letters not less than 4-1/2 high, the words "Railroad Crossing", such boards being not less than 8' above the surface of the ground and such sign being so placed as to be plainly visible to persons using said public thoroughfare in approaching the railroad from either direction; contrary to the rules and regulations of the Georgia Public Service Commission issued pursuant to statutory laws of the State of Georgia.

(k) Said crossing is a notoriously dangerous one, because of the frequency of fogs at this location, the angle at which the railroad crosses the highway, the high growth of trees and underbrush on the right of way in close proximity to the railroad and the highway. Because of the particularly hazardous nature of this particular crossing, making it extremely difficult, if not impossible, for motorists to observe the approach of trains, and the presence of dark flat cars on the tracks, said Defendant had adopted the practice, when moving long lines of dark flat cars across said crossing, to have a member of the crew on the engine throw out lighted fuses on each side of the crossing in order to warn vehicular traffic of the presence of such dark flat cars upon the crossing. Said track is a track which is used only by freight trains and is used only at infrequent intervals. The driving public has come to rely upon the presence of fusees in the road when the track is in use. On the night in question said Defendant was moving a string of 92 dark flat pulp-wood cars slowly across said crossing; it was a dark, foggy, misty night and in conformity with their practice on such nights, the engine crew threw fuses on each side of the road at this crossing, to warn vehicular traffic. However, the train was so long and was moving so slowly that said fuses had burnt out and were no longer in evidence at the time said automobile approached the crossing and struck the eighty-third (83rd) flat car making up the freight train.

(l) Said Defendant was negligent in failing to throw fuses on the night in question of sufficient burning length to burn until the last car of the train had crossed the crossing.

(m) Because of the peculiarly hazardous nature on this night of the crossing in question, which crossing had been the scene of many similar accidents, and which condition was known to the Defendant, said Defendant was negligent in moving an engine and ninety-two (92) black flat cars across said crossing on a foggy night and at a speed so slow that they moved noiselessly and were unobservable, without giving some warning of some kind, in the form of lighted fuses or in the form of a member of the crew with a lantern or in the form of signalling devices or reflectors, of the presence of flat cars upon the crossing. Prior to said collision and on the night in question no warning of any kind of the existence of a railroad crossing at this point was present at said crossing except an old washed-out board sign erected within just a few feet of the rails, the wording on which was unreadable, as a result of age and weather.

(n) Although said Defendant had long known of the extremely hazardous nature of said crossing because of the numerous accidents which had occurred there similar to the one involved in this case, and although it had, in recognition of this condition, adopted the inefficient expedient of putting out fusees as aforesaid, it failed and refused, in spite of the utmost urging on the part of the public, the County Commissioners of Glynn County, the Public Service Commission and other public bodies, to install effective warning signals prior to the fatal accident involved in this case.

(o) The train was made up of an engine and ninety-two (92) low slung dark flat cars with no sides,

which are used for hauling pulp wood, such cars being practically invisible under the best conditions. The view on each side of the crossing was completely obscured by underbrush and trees. There were no lights of any kind at the crossing and there were no lights or reflectors of any kind on the railroad cars. On the night in question, the crossing was engulfed in fog. Neither Plaintiff's said son, nor the driver of the automobile, was familiar with the crossing and there was no visible warning of any kind that a crossing existed or that railroad cars were being pulled over the crossing. The spur track is used only on rare occasions, and mostly by engines pulling dark colored pulp wood flat cars without reflectors and without sides, which cars are practically impossible to see at this crossing, which is very frequently engulfed in fog, because of the low ground and marsh.

(p) Under the conditions existing on the night in question, it was impossible for the driver of said automobile to see the flat cars on said crossing in time to bring the automobile to a stop before reaching the crossing. The pavement was dark, the flat cars were dark, the night was dark, the fog was bad at the crossing, (although not bad elsewhere on the road before reaching the crossing), there were no lights of any kind at the crossing or on the flat cars; the foliage on each side of the crossing was dark and dense, all blending into one dark mass of fog obscured scenery, of which the engine crew was cognizant, having just passed through it, but of which the driver of the automobile was not aware until too late to avoid the collision.

Respectfully submitted,
E. WAY HIGHSMITH,
Attorney for Plaintiff.

Amendment allowed, subject to objection, this February 24, 1956.

F. M. SCARLETT,
United States District Judge.

ORIGINAL AMENDMENT TO COMPLAINT.

Filed March 2, 1956.

In the United States District Court for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp, Plaintiff,
vs. Civil Action No. 292.
Atlantic Coastline Railroad Company, a Croporation, Defendant.

Comes Now the Plaintiff, in response to Defendant's Motion for a More Definite Statement, with respect to Defendant's acts of negligence, and in response to Defendant's Motion to Strike and redrafts her amendment heretofore filed, and amends her complaint as follows, to-wit:

By adding the following paragraphs:

9. The killing of Plaintiff's son was the direct and proximate result of the negligent, careless, reckless, wilful, wanton and unlawful acts and omissions, or any one or more of them, or any combination thereof, of the Defendant, its servants, agents and employees, acting in the course and scope of their employment, in the following particulars, among others, to-wit:

(a) In failing and neglecting to exercise due care under the facts and circumstances then and there existing;

(b) In failing and neglecting to give any warning whatsoever, or sufficient warning, to persons travelling U. S. Highway 25 of the obstruction of said highway at the time and place in question;

(c) In failing and neglecting to maintain a watchman, signals, automatic signals, reflectors, gates, cross arms or observable signs or warnings or notice of any kind, or sufficient warnings of proper kind, to northbound vehicular traffic of the existence of a railroad crossing and of a train passing over said crossing at the time and place in question;

(d) In blocking said highway at the time and place in question with dark railroad cars without putting out flares or lanterns of any kind, or making any other effort of any kind to warn vehicular traffic of said road block, contrary to law and Defendant's own rules and regulations in such cases made and provided;

(e) In maintaining a dangerous crossing, known by Defendant to be dangerous, without any warnings whatsoever to vehicular traffic.

(f) Said Defendant operated a railroad through said county, which crosses a public thoroughfare, namely U. S. Route No. 25 in said county, at the time and place of said collision, as aforesaid.

(g) Said Defendant then and there carelessly and negligently maintained and operated its said railroad crossing, and its servants so carelessly and negligently drove said locomotive engine and train as to cause same to collide with great force and violence with the aforesaid motor vehicle in which Plaintiff's son was riding as a guest.

(h) Said Defendant was negligent in failing to erect at such railroad crossing what is commonly known as the "X" sign, the same being a sign in the form of the letter "X" by boards crossed on an upright post, the boards forming the "X" being not less than 6" wide and 4' in length and painted white, bearing on both sides in black painted letters not less than 4-1/1 high, the words "Railroad Crossing", such boards being not less than 8' above the surface of the ground and such sign being so placed as to be plainly visible to persons using said public thoroughfare in approaching the railroad from either direction; contrary to the rules and regulations of the Georgia Public Service Commission issued pursuant to statutory laws of the State of Georgia.

(i) Said crossing is a notoriously dangerous one, because of the frequency of fogs at this location, the angle at which the railroad crosses the highway, the embankment and dense growth of trees and underbrush on and near Defendant's right of way in close proximity to the railroad and the highway, and the absence of adequate warning signs and those required by law on the highway. Because of the particularly hazardous nature of this particular crossing, making it extremely difficult, if not impossible, for motorists to observe the approach of trains, and the presence of

dark railroad cars on the tracks, said Defendant had adopted the practice, when moving long lines of dark cars across said crossing, to have a member of the crew on the engine throw out lighted fuses on each side of the crossing in order to warn vehicular traffic of the presence of such cars upon the crossing. Said track is one which is used only by freight trains and is used only at infrequent intervals. The driving public has come to rely upon the presence of fusees in the highway when the track is in use. On the night in question said Defendant was moving a string of 92 dark railroad cars slowly across said crossing; it was a dark, foggy, misty night, but, notwithstanding this established practice of throwing out lighted fusees under such conditions, the Defendant did fail on the night in question to do so, or, if it did so, said fusees were defective and were not burning at the time of the collision.

(j) Because of the peculiarly hazardous nature on this night of the crossing in question, which crossing had been the scene of many similar accidents during a relatively short period of time prior to October 25, 1951, and when conditions were the same, and which condition was known to the Defendant, said Defendant was negligent in moving an engine and 92 dark railroad cars across said crossing on a foggy night without giving some warning of some kind, in the form of lighted fusees or in the form of a member of the crew with a lantern or in the form of signalling devices or reflectors, of the presence of the train upon the crossing. Prior to said collision and on the night in question no warning of any kind of the existence of a railroad crossing at this point was present at said crossing except an old square board sign

erected within just a few feet of the rails, the painted letters on which were broken and faded, rendering the sign ineffective as a warning to motorists.

(k) Although said Defendant had long known of the extremely hazardous nature of said crossing, because of the numerous accidents which had occurred there similar to the one involved in this case, and during a relatively short period of time prior thereto, and when conditions were the same, and although it had, in recognition of this condition, adopted the inefficient expedient of putting out fusees, as aforesaid, it failed and refused to install effective warning signals prior to the fatal accident involved in this case.

(l) The train was made up of an engine and 92 dark, gondola type cars which are used for hauling stumps or pulpwood, such cars being practically invisible at night under normal weather conditions. The view on each side of the crossing was completely obscured by embankments, underbrush and trees, both on and near Defendant's right of way. There were no lights or reflectors of any kind on the railroad cars. On the night in question, the crossing was engulfed in fog. Neither Plaintiff's said son, nor the driver of the automobile, was familiar with the crossing and there was no visible warning of any kind that a crossing existed or that railroad cars were being pulled over the crossing. The track is used only on rare occasions and mostly by engines pulling dark-colored railroad cars without reflectors, which cars are practically impossible to see at this crossing, which is very frequently engulfed in fog.

(m) Under the conditions existing on the night in question, it was impossible for the driver of said automobile to see the railroad cars on said crossing in

time to bring the automobile to a stop before reaching the crossing. The pavement was dark, the fog was bad at the crossing, there were no lights of any kind at the crossing or on the railroad cars; the foliage on each side of the crossing was dark and dense, of all of which the engine crew was cognizant, having just passed through it, but of which the driver of the automobile was not aware until too late to avoid the collision.

Respectfully submitted,
E. WAY HIGHSMITH,
Attorney for Plaintiff.

Amendment allowed, subject to objection, this March 2, 1956.

F. M. SCARLETT,
United States District Judge.

Amendment acknowledged March 1, 1956.
LARRY E. PEDRICK,
Atty. for Deft.

VERDICT.

United States District Court for the Southern District of Georgia—Brunswick Division.

Mrs. Woodrow Sapp, Plaintiff,
v. No. 292.
Atlantic Coast Line Railroad Co., Defendant.

We, the Jury, find in favor of plaintiff in the amount of $34,000.00 (thirty four thousand dollars).

Recorded on Page .....
EMMETT M. LOTT,
(Foreman).

(Date) March 14th, 1956.

VERDICT.

United States District Court for the Southern District of Georgia—Brunswick Division.

Mrs. James H. Tyre, Plaintiff,
v. No. 293.
Atlantic Coast Line Railroad Co., Defendant.

We, the Jury, find in favor of plaintiff in the amount of ($34,000.00) thirty four thousand dollars.

Recorded in Page Book ...
EMMETT M. LOTT,
(Foreman).

(Date) March 14th, 1956.

VERDICT.

United States District Court for the Southern District of Georgia—Brunswick Division.

Mrs. Leroy Beckham, Sr., Plaintiff,
v. No. 294.
Atlantic Coast Line Railroad Co., Defendant.

We, the Jury, find in favor of plaintiff in the amount of Forty Thousand Dollars ($40,000.00).

Recorded on Page ... Book ...
EMMETT M. LOTT,
(Foreman).

(Date) March 14th, 1956.

MOTION OF DEFENDANT FOR JUDGMENT NOTWITHSTANDING VERDICT OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL.

Filed March 16, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp, Plaintiff,
vs. Civil Action No. 292.
Atlantic Coast Line Railroad Company, Defendant.

Comes now the defendant, Atlantic Coast Line Railroad Company, and files its motion praying that the

jury's verdict herein and the judgment rendered and entered thereon be set aside and that judgment be entered herein in favor of the defendant, notwithstanding the verdict; and also its motion for a new trial in the alternative:

And as grounds for judgment notwithstanding the verdict, defendant alleges:

1. That the verdict is contrary to the evidence and without evidence to support it.

2. That the verdict is contrary to law.

3. That the verdict is contrary to the law and the evidence.

4. That the Court erred in refusing to direct a verdict in favor of defendant on its timely motion made at the trial, upon the grounds, first, that the evidence failed to disclose any act of negligence of the defendant which proximately caused injury to plaintiff, and, second, that the evidence disclosed that the proximate cause of the collision was the negligence of the driver of the automobile.

And for grounds of its motion for new trial, in the alternative, defendant alleges:

1. That the verdict is decidedly and strongly against the weight of the evidence.

2. That the Court erred in charging the jury the prima facie presumption sta.. e of Georgia, making proof of injury by the running of cars of a railroad

prima facie evidence of negligence on the part of the servants of the company, because the evidence introduced at the trial rebutted the prima facie presumption sufficiently to cause it to vanish from the case, and such change was not applicable to the issues in the case.

---

3. Because the Court, over objection of defendant, permitted erroneous arguments to the jury by plaintiff's counsel.

LARRY E. PEDRICK,
(Larry E. Pedrick).

P. O. Address:
Waycross, Georgia.

L. J. BENNET,
(L. J. Bennet),
Attorneys for Defendant.

P. O. Address:
Brunswick, Georgia.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp, Plaintiff,
vs. Civil Action No. 292.
Atlantic Coast Line Railroad Company, Defendant.

To Mrs. Woodrow Sapp and to E. Way Highsmith, Esq., Attorney for Plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before the Court at the Judge's chambers, Postoffice Building, in the City of Brunswick, Georgia on the 30th day of March,

1956, at 11 o'clock A. M., or as soon thereafter as the matter may be heard by the Court.

This 17 day of March, 1956.

LARRY E. PEDRICK,
(Larry E. Pedrick).

Waycross, Georgia.

L. J. BENNET,
(L. J. Bennet),
Attorneys for Defendant.

Brunswick, Georgia.

I, Larry E. Pedrick, Attorney for defendant, hereby certify that I have served the foregoing motion and notice of motion by mailing a copy of same to E. Way Highsmith, Attorney for Plaintiff, at his Post Office Address, Box 414, Brunswick, Georgia.

This 17 day of March, 1956.

LARRY E. PEDRICK,
(Larry E. Pedrick).

JUDGMENT OVERRULING MOTION FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Filed August 15, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Mrs. Leroy Beckum, Sr., Mrs. Woodrow Sapp, and Mrs. James H. Tyre, Plaintiffs,

vs.

Civil Actions No. 292, 293, 294.

Atlantic Coast Line Railroad Company, Defendant.

Defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial in these three consolidated cases having been argued on August 6, 1956, same is hereby overruled and denied upon the following grounds, to-wit:

1. Defendant's principal argument is that there was no evidence of negligence on the part of the defendant. There was evidence, however, that defendant had rcognized the crossing involved in this case as a particularly hazardous one on foggy nights by throwing out lighted fusees on such nights to warn vehicular traffic of the presence of railway cars on the tracks. There was evidence that on the night in question the crossing was engulfed in fog and the fusees were either not thrown out, or if they were, they were not burning at the time of the accident.

Although the defendant summoned to Court, and swore, all the members of the train crew, it did not use any of them as witnesses to contradict plaintiffs' evidence about the fusees, or for any other purpose. Defendant closed without offering any evidence.

Under Georgia law. "Where a party has evidence in his power and within his reach, by which he may repel a charge or claim against him, and omits to produce it—a presumption arises that the charge or claim is well founded; but this presumption may be rebutted." Ga. Code 38-119.

In the Fifth Circuit case of Atlanta & St. Andrews Railway Co. vs. Church, 212 Fed. 2d 688, 691, it was held that recovery may not be denied as a matter of law in a case in which, though the railroad thought it necessary to put down lighted fusees, it either put them out ineffectively or they went out before the accident.

2. Defendant contends that this was not a case in which Section 94-1108 of the Code of Georgia should have been given in charge to the jury. That section provides that "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injuries."

This is a rebuttable presumption and Georgia Courts have uniformly held that it disappears immediately the railroad goes forward with its proof

of due care. When that occurs, the section should not be charged. Atlantic Coast Line Ry. Co. vs. Thomas 83 Ga. App. 477, 483; 64 S.E.2d 301.

But in the case at bar, the defendant railroad company, although having the witnesses at hand with which to disprove plaintiffs' contentions, if they were not true, with respect to the foggy night and the failure to put down fusees of sufficient burning length to last until the long string of cars passed the crossing, it did not choose to go forward with that proof, thus raising the presumption that the charge was well founded

Defendant's contention is that the statutory prima facie rule was rebutted by plaintiffs' own witnesses, making it unnecessary for defendant to offer testimony in order to avoid the impact of the statute. But the contention is not borne out by the evidence. All of the evidence on the subject of fusees was to the effect that they were not burning at the time of the accident and that the night was foggy.

No other grounds of error were argued by the defendant upon the hearing.

In Chambers at Brunswick, Georgia, this August 14th, 1956.

F. M. SCARLETT,
United States Judge.

Recorded: Page ..., Book 4 (Aug. 14-56).

NOTICE OF APPEAL.

Filed September 12, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp, Plaintiff,
vs. Civil Action No. 292.
Atlantic Coast Line Railroad Company, Defendant.

Notice is hereby given that Atlantic Coast Line Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment against them entered in this action on March 15, 1956, including the judgment entered August 14, 1956, denying the motion of defendant for judgment in its favor notwithstanding the verdict and in the alternative motion for new trial.

This 12 day of September, 1956.

L. J. BENNET,

Brunswick, Ga.

LARRY E. PEDRICK,
Attorney for Atlantic Coast Line Railroad Company.

Waycross, Georgia.

NOTICE OF APPEAL.

Filed Sept. 12, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Mrs. James H. Tyre, Plaintiff,
vs. Civil Action No. 293.
Atlantic Coast Line Railroad Company, Defendant.

Notice is hereby given that Atlantic Coast Line Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment against them entered in this action on March 15, 1956, including the judgment entered August 14, 1956, denying the motion of defendant for judgment in its favor notwithstanding the verdict and in the alternative motion for new trial.

This 12 day of September, 1956.

L. J. BENNET,

REESE, BENNET & GILBERT,
P. O. Box 206,
Brunswick, Ga.

LARRY E. PEDRICK,
Attorneys for Atlantic Coast Line Railroad Company.

BENNETT, PEDRICK & BENNETT,
Waycross, Georgia.

NOTICE OF APPEAL.

Filed September 12, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Mrs. Leroy Beckham, Sr., Plaintiff,
vs. Civil Action No. 294.
Atlantic Coast Line Railroad Company, Defendant.

Notice is hereby given that Atlantic Coast Line Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment against them entered in this action on March 15, 1956, including the judgment entered August 14, 1956, denying the motion of defendant for judgment in its favor notwithstanding the verdict and in the alternative motion for new trial.

This 12 day of September, 1956.

L. J. BENNET,

Brunswick, Ga.

LARRY E. PEDRICK,
Attorneys for Atlantic Coast Line Railroad Company.

Waycross, Georgia.

MOTION TO CONSOLIDATE.

Filed March 12, 1956.

In the United States District Court for the Southern District of Georgia, Brunswick Division.

Civil Actions Nos. 292, 293 and 294.

Mrs. Woodrow Sapp, Mrs. James H. Tyre, Sr., and Mrs. Leroy Beckham, Plaintiffs,

vs.

Atlantic Coast Line Railroad Company, Defendant.

Come Now Plaintiffs in each of the above entitled causes, pursuant to Rule 42a, and move the Court to consolidate said three causes into a single action upon the ground that a common question of law and/or fact exists in each of said causes; each having arisen out of the same occurrence and the Defendant in each being the same; so that said causes shall be treated for all purposes as if they had been embodied in one complaint, as provided by Rule 20.

Respectfully submitted,

E. WAY HIGHSMITH,

Attorney for Plaintiffs.

ORDER OF COURT.

It Appearing to the Court that all three of these cases arose out of one accident and that a common question of law and/or fact exists in each case,

It Is Considered, Ordered and Adjudged that said three cases be consolidated under Rule 42(a) into one cause of action and that they be treated for all purposes as if three causes had been embodied in one complaint.

This March 12, 1956.

F. M. SCARLETT,
Judge, United States District Court.

APPELLANT'S DESIGNATION OF RECORD TO BE USED ON APPEAL.

Filed Sept. 17, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 292.
Mrs. Woodrow Sapp, Appellee,

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 293.
Mrs. James H. Tyre, Appellee.

Atlantic Coast Line Railroad Company, Appellant,
vs. No. 294, Civil Action.
Mrs. Leroy Beckham, Sr., Appellee,

The above three cases were by order of the Court consolidated for the purposes of trial and tried together in the District Court, hence there is only one evidence record. The pleadings are the same in each case, except that in case No. 294 it is alleged that Leroy Beckham, Jr., son of the plaintiff, was driving the automobile, while in cases numbers 292 and 293 it is alleged that the deceased son of plaintiff was riding as a guest of the driver of the car. Therefore it is deemed necessary to designate only one set of pleadings, and the record is therefore designated as follows:

1. The original petition of Mrs. Woodrow Sapp, plaintiff, in case No. 292.

2. Answer of defendant in case No. 292 of Mrs. Woodrow Sapp, plaintiff.

3. Amendment to the complaint in case No. 292 of Mrs. Woodrow Sapp, plaintiff.

4. Transcript of the record of the proceedings at the trial, including motions of appellant for directed verdict as shown by the transcript, and omitting such immaterial matter as may be agreed upon by counsel for the respective parties.

5. Documents and photographs in original form identified as plaintiff's exhibits 1 through 6, to be filed with the Court of Appeals as original exhibits, by order of the District Court.

6. Charge of the Court, including exceptions thereto by counsel.

7. Verdict of jury in case No. 292 and judgment of the Court thereon.

8. Verdict of the jury in case No. 293 and judgment of the Court thereon.

9. Verdict of the jury in case No. 294 and judgment of the Court thereon.

10. Motion of appellant for judgment notwithstanding verdict and for new trial in alternative in case No. 292 of Mrs. Woodrow Sapp (such motion in cases numbers 293 and 294 being identical).

11. Judgment and opinion of the Court overruling motion for judgment notwithstanding verdict and motion for new trial.

12. Notice of appeal in Sapp case No. 292, with entry of filing.

13. Notice of appeal in Tyre case, No. 293, with entry of filing.

14. Notice of appeal in Bekham case, No. 294, with entry of filing.

15. Order of District Judge that one record be transmitted on appeal, and also that photographs and other documents be filed as original exhibits.

16. Appellant's statement of points.

17. This designation.

LARRY E. PEDRICK,
(Larry E. Pedrick),
Attorney for Appellant.

P. O. Address:
Waycross, Georgia.

I hereby certify that I have served a copy of the foregoing designation by mailing the same to E. Way Highsmith, attorney of record for appellees, at his post office address Brunswick, Georgia.

This September 14, 1956.

LARRY E. PEDRICK,
(Larry E. Pedrick),
Attorney for Appellant.

APPELLANT'S STATEMENT OF POINTS ON APPLEA.

Filed Sept. 17, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 292.
Mrs. Woodrow Sapp, Appellee.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 293.
Mrs. James H. Tyre, Appellee.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 294.
Mrs. Leroy Beckham, Sr., Appellee.

1. The Trial Judge erred in refusing to direct a verdict for the defendant in each of the three cases; first, upon the ground that from the evidence of the plaintiffs themselves it is shown that the defendant company was guilty of no negligence, the result of which caused the death of the son of either of the plaintiffs; second, because the evidence introduced by the plaintiffs conclusively shows that the sole proximate cause of the death of the three deceased men was the negligence of the driver of the automobile in driving the automobile into the side of a moving train passing over the crossing.

2. The Trial Judge erred in charging the jury in all three cases the provisions of Section 94-1108 of the

Code of Georgia, to the effect that in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives of cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury.

LARRY E. PEDRICK,
(Larry E. Pedrick),
Attorney for Appellant, Atlantic Coast Line Railroad Company.

I hereby certify that I have served a copy of the foregoing statement of points by mailing such copy to E. Way Highsmith, attorney of record for appellee, at his post office address in Brunswick, Georgia.

This September 14, 1956.

LARRY E. PEDRICK,
(Larry E. Pedrick),
Attorney for Appellant.

ORDER FOR RECORD ON APPEAL.

Filed September 20, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 292.
Mrs. Woodrow Sapp, Appellee.

Atlantic Coast Line Railroad Company, Appellant,
vs. No. 293.
Mrs. James H. Tyre, Appellee.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 294.
Mrs. Leroy Beckham, Sr., Appellee.

The above cases having been consolidated for the purposes of trial and tried together, and Notice of Appeal having been filed by the appellant in each case, it is ordered that one record be transmitted to the United States Court of Appeals, Fifth Circuit, omitting therefrom all duplications of pleadings or other matters.

It is further ordered that the documents and photographs introduced in evidence and identified as plaintiff's exhibits 1 through 6 be filed in the United States Court of Appeals, Fifth Circuit, as original exhibits for the use of the Court and that they shall not be printed as a part of the record but used in their original form.

So ordered ths September 20, 1956.

F. M. SCARLETT,
United States District Judge.

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL.

Filed Oct. 17, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 292.
Mrs. Woodrow Sapp, Appellee.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 293.
Mrs. James H. Tyre, Appellee.

Atlantic Coast Line Railroad Company, Appellant,
vs. Civil Action No. 294.
Mrs. Leroy Beckham, Sr., Appellee.

The above cases having been tried together in the District Court; separate notices of appeal having been filed in each case on September 12, 1956; order having been entered providing for only one record on appeal; and it appearing that at the time of the filing of notice of appeal in each case another appeal was pending requiring preparation of a record and it further appearing that a term of the District Court has intervened which makes it impossible for the clerk to

prepare the record in this case for filing within forty days from the date of filing the notice of appeal;

Now, therefore, it is ordered that the time for filing and docketing the record in the above stated cases be extended to a day not more than ninety days from the date of filing the notice of appeal, that is, that the record shall be filed in the Court of Appeals not later than December 11, 1956.

So ordered this 17 day of October, 1956.

F. M. SCARLETT,
United States District Judge.

THE CHARGE OF THE COURT.

Filed Aug. 9, 1956.

In the United States District Court for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp,
vs. No. 292.
Atlantic Coast Line Railroad Company

Suit for damages.

Mrs. James H. Tyre,
vs. No. 293.
Atlantic Coast Line Railroad Company.

Suit for damages.

Mrs. Leroy Beckham, Sr.,
vs. No. 294.
Atlantic Coast Line Railroad Company.

Suit for damages.

Lady and Gentlemen of the Jury:

These are three suits for damages. One suit is that of Mrs. Woodrow Sapp vs. the Atlantic Coastline Railroad Company. Another one is that of Mrs. James H. Tyre vs. the Atlantic Coastline Railroad Company, and one of Mrs. Leroy Beckham, Sr., vs. the Atlantic Coastline Railroad Company. Now, for the sake of convenience these three cases are being tried together, but they remain three sparate suits which require three separate verdicts.

In substance, lady and gentlemen of the jury, the three plaintiffs in these suits, the three mothers, have each brought a separate suit for damages against the Atlantic Coastline Railroad Company for the death of their three sons, in which they contend that their three sons were negligently killed by the Atlantic Coastline Railroad Company in this county at or near Pyles Marsh Crossing. The defendant, Atlantic Coast Line Railroad Company, denies these contentions and state that these three boys were not killed by any negligence of the railroad company, but were killed by their own acts of negligence, and that the railroad company is in no wise responsible for their deaths.

Now, the pleadings in this case will be out with you, not as evidence, but for you to read over, if you so desire, and ascertain the exact contentions of the respective parties. You can read the pleadings over in these cases, as I said, to ascertain the exact contentions of the respective parties, but they are not to be considered by you as evidence in any wise.

Now, Lady and Gentlemen of the Jury, it is necessary that these three plaintiffs establish their respective cases by a preponderance of the evidence, and by a preponderance of the evidence is meant that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt is yet sufficient to incline the mind of a reasonable, fair and impartial juror to one side of the issue rather than to the other.

In determining where the preponderance of the evidence lies you may consider all the facts and circumstances of the case, the witnesses manner of testifying, their demeanor on the witness stand, their interest or want of interest in the case, or any other fact or circumstance that may legitimately appear to you

upon the trial of the case and from the witnesses demeanor upon the witness stand.

I am going to charge you separately in these cases. First, I am going to charge you with reference to the case of Mrs. Leroy Beckham, Sr., vs. the Atlantic Coatline Railroad Company, whose son was the driver of the automobile, and then I will charge you jointly with reference to the cases of Mrs. Woodrow Sapp and Mrs. James H. Tyre. Mrs. Leroy Beckham, Sr., is the mother of the boy who was the driver of the automobile at the time of the collision.

I will charge you first as to Ordinary care. Ordinary care is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. The absence of ordinary care is commonly denominated as ordinary negligence.

I charge you that a witness may be impeached in several different ways. Among them would be proof of contradictory or inconsistent statements about a material fact. Whether such a witness has been impeached or not, is a question for the jury to determine because, as I stated, you are the sole judges of the credibility of the witnesses who have testified in your presence.

I charge you, that if you believe that a witness has been impeached, wholly impeached and unworthy, they would be authorized to discard his entire testimony; or, if they think he has been impeached in part and sustained in part; the jury may accept whatever portion of the evidence they believe and discard that which they disbelieve. It all goes back to the same thing, lady and gentlemen of the jury, that you are the sole judges of the credibility of the witnesses.

Now, gentlemen, in case of conflicts, in the evidence, and there are usually conflicts in contested

cases, it is the duty of the jury, if it can do so, to reconcile the conflicts without imputing perjury to anybody, to any witness, reconciling them in any manner that you can consistently do so; but, if you cannot reconcile their testimony, then it is for the jury to say what witness and what evidence you will believe and what witness or evidence you will disbelieve. That is a matter that is solely within the province of the jury.

Now, Lady and Gentlemen of the Jury, in approaching this case here, the first thing that the jury should address itself to would be to determine whether or not in this case the defendant, railroad company, is guilty of any one or more of the acts of negligence as stated in the pleadings in these cases.

If, upon a consideration of the evidence, you find that the defendant has not committed any act of negligence, why, then your deliberations would stop right there, because the defendant would not be liable and would be entitled to a verdict.

Now, I might say here, Lady and Gentlemen of the jury, that simply because a person is killed by a railroad train that does not necessarily mean that the railroad company is liable for the death of that person. The only way in which the railroad company would be liable would be through some act of negligence which would be the proximate cause of the person's death, not because the railroad company may have killed a person, you couldn't find a verdict for the plaintiffs upon that alone, you must find that the defendant, railroad company, was guilty of some act of negligence, which was the proximate cause of the person's death.

If you find, gentlemen of the jury, upon a consideration of the evidence, you find that the defendant has

not committed any act of negligence, why, then, as I say, your deliberations would stop right there, because the defendant would be entitled to a verdict.

If you find Lady and Gentlemen of the jury, from the evidence that the defendant is guilty of one or more acts of negligence, then you would ascertain whether or not the plaintiff's son in this case could have, by the exercise of ordinary care on this occasion, discovered the negligence of the defendant and have avoided the injury to himself. If you find that he could have done that, then you would stop there, because the plaintiffs would not be entitled to recover, and the defendant would be entitled to a verdict. In other words, the defendant might be guilty of negligence, but if the plaintiff's son, through the exercise of ordinary care and diligence could have avoided the injury to himself, his mother would not be entitled to recover.

I charge you further that if you find that there were some acts of negligence committed and that the plaintiff could not, by the exercise of ordinary care and diligence, have discovered the negligence, if any, and have avoided the injury to himself, then you would go further, and ascertain whether or not such act or acts of negligence, if any, on the part of the defendant, were the proximate cause of this collision. In other words, as I have said before, even though the railroad company might be guilty of negligence, the act or acts of negligence, if any, must be the proximate cause of the death of the plaintiff's son.

If the negligence of the defendant, if you find it was negligent, was not the proximate cause of the injury and damage, why, then of course, the plaintiff would not be entitled to recover.

Now, Lady and Gentlemen of the jury, if you find from the evidence that both the plaintiff's son and the defendant, railroad company, were negligent, and you find that the negligence of the plaintiff's son was equal to or greater than that of the defendant, then the plaintiff could not recover.

But if you find that the plaintiff's son was less negligent than the defendant, then the plaintiff would be entitled to recover, but the amount of the recovery should be reduced in proportion to the amount of fault attributable to the plaintiff's son.

Now, Lady and Gentlemen of the Jury, I charge you, as a matter of law, that in all actions against the railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury. But in that connection I charge you, Lady and Gentlemen of the Jury, that the defendant may rebut this prima facie evidence by evidence introduced in this case by either the plaintiffs or the defendant. In other words, it can be refuted either by evidence on the part of the plaintiffs or by the defendant.

I charge you further that when a train is standing or passing over a crossing it is ordinarily of itself sufficient notice of danger, and it is unnecessary to use gates or flagmen in such cases to call attention to that which every prudent person should see or know.

I charge you that the driver of an automobile would be negligent if he drove his automobile at such rate of speed that he was unable to stop the same within the distance of the lights of the car under the conditions existing at that time.

The Court charges you further that a driver of an automobile who knows that he is approaching a railroad crossing in the night time and fails to reduce the speed of his car so that the car may be stopped within the range of his lights when he discovers that a train of cars is stopped or passing over such crossing, is guilty of such a lack of ordinary care as will prevent a recovery from the railroad in this case.

I charge you further, by agreement, in the cases of Mrs. Woodrow Sapp and Mrs. James H. Tyre, Sr., it appears that each of these plaintiffs were paid the sum of $6,000.00 by Leroy Beckham—No, that hasn't got anything to do with this Beckham case, about which I am charging you now. So you will disregard that last statement, Lady and Gentlemen of the Jury.

I charge you, first, that a mother may recover for the homicide of a child, minor or sui juris, upon whom she is dependent and who contributes to her support, unless said child shall leave a wife husband or child. The mother shall be entitled to recover the full value of the life of such child, reduced to its present value.

The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived. The term "full value" means the gross sum the deceased would have earned to the end of his life, had he not been killed, reduced by you to its present cash value.

In arriving at the gross sum the deceased would have earned to the end of his life, had he not been killed, the jury should consider the age of the deceased at the time of his death, his health, occupation, habits and surroundings, amount of money he was earning, his expectation of life, the probable loss

of employment, voluntary abstinence from work, dullness in business, reduction of wages, increasing infirmities of age, with a probable corresponding diminution of earning capacity, and any other causes which may reasonably contribute to the illustration of the gross earnings of a lifetime.

If the jury should find that the plaintiff is entitled to recover, it would be their duty to first determine the gross value of the life of the decedent, and then to reduce that sum to its present value, using as a basis of reduction seven percent per annum as the legal value of money in Georgia.

To illustrate: $100.00 due and payable today is worth $100.00 today. $100.00 due and payable one year from today would be worth today only that sum to which when you add seven percent per annum for one year would principal and interest together, make $100.00.

To carry the illustration one step farther: $100.00 due and payable two years from today would not be worth $100.00 today. Neither would it be worth as much as $100.00 due and payable one year from today. It would be worth today only that sum to which when you add seven percent per annum for two years, would, principal and interest together make $100.00.

That is the principle by which unearned earnings extending into the future, should be reduced to its present value.

There is in evidence a certain table known as a mortality table, which the jury may or may not use, as they may see fit. The purpose of this table is to show the expectation in life of the average person of a given age, as determined by the compilers of this table over a wide range of observation. The ages observed are listed in the first column, and the expecta-

tion in life for each age listed is found in the second column immediately opposite that age.

It cannot be assumed that the expectation in life of the decedent at the time of his death was that of the average person. It may have been more or it may be been less. What it was is a question for the jury to determine. In doing so the jury should look to the evidence, consider his age, habits of life, the state of his health, and any and all other facts which might reasonably tend to indicate his probable expectation in life at the time of his death.

Now, the plaintiff contends in this case that the crossing was more than ordinarily dangerous and that was one of the proximate causes of the collision and which resulted in the death of this Beckham boy. I charge you that in order for the plaintiff to recover it must be established by a preponderance of the evidence that the conditions surrounding the crossing in question at the time of the collision was such as to render that crossing more than ordinarily dangerous, and that such fact was known to the members of the railroad crew on the train in question, or should have been known to them by the exercise of ordinary care. A crossing is more than ordinarily dangerous if the conditions are such that a reasonably prudent person could not, by the exercise of ordinary care, use the same with safety unless the railroad employees knew and give warning of the presence of the train on the railroad crossing. It is not necessary that the crossing be more than ordinary hazardous at all times. Conditions and surroundings of the crossing may change materially from time to time. A warning of the presence of a train on a crossing may not be required under the law at one time, and it might be negligence to fail to provide one at another time. The

question for your determination is whether or not at the time of the accident the conditions surrounding the crossing in question rendered it more than ordinarily hazardous or unusually dangerous. That is a question of fact for you, Lady and Gentlemen of the Jury, to determine.

Now, after all is said and done the word "verdict" is derived from two Latin words, which means in substance the truth, and that is what you all are sworn to find in this case, the truth as to whether the plaintiff has carried the burden by a preponderance of the evidence with respect to her contentions. If she has not done so, why, then the plaintiff could not recover. If you find that the plaintiff has carried the burden by a preponderance of the evidence, then the plaintiff would be entitled to recover in such an amount as you believe reasonable and just under the evidence in the case and the rules of law as given you in charge by the Court.

There is certain documentary evidence that will go out with you and you will give that documentary evidence the same weight and credit as you give the other evidence in the case.

If you find for the plaintiff, the form of your verdict would be: "We, the Jury, find for the plaintiff" in such a sum as you think she is entitled to recover. If you find for the defendant the form of your verdict would simply be: "We, the jury, find for the defendant," and in either event you would date it, and let one of your number sign it as foreman.

Now, in these other two cases, Lady and Gentlemen of the jury, that is the case of Mrs. Woodrow Sapp vs. the Atlantic Coastline Railroad Company, and the case of Mrs. James H. Tyre, Sr., vs. the Atlantic Coastline Railroad Company, the plaintiffs in

these two cases contend that their sons were passengers in the automobile that was driven by the Beckham boy, about which I have already charged you, at the time of this accident, and that through the negligence of the railroad company, as alleged in their respective petitions and amendments, their sons were killed, and they are suing for damages for the loss of their sons.

The defendant, Atlantic Coastline Railroad Company on the other hand contends that they were not negligent, that the negligence of the railroad company did not cause these boys deaths, but that the negligence of the Beckham boy, who was driving this car, or automobile, was the cause of their death.s

I charge you in that connection that if you find that the driver of this car, the Beckham boy, that his negligence was the cause of the deaths of these two passengers then, of course, the railroad company would not be liable, because the railroad company would only be liable for its negligence which negligence was the proximate cause of this collision. Is that your contention, Mr. Pedrick?

Mr. Pedrick:

If Your Honor pleases, not only the negligence of the driver of the automobile but the passengers themselves were negligent.

The Court:

All right. Therefore, Lady and Gentlemen of the Jury, the defendant railroad company say that they are not liable for these reasons.

Now, as I charged you in the other case, these pleadings will be out with you, not as evidence, but

for you to read the same over, if you so desire, to get the exact contentions of the respective parties.

Now, in these two cases, Lady and Gentlemen of the Jury, it is necessary that they prove their respective contentions by a preponderance of the testimony, and by a preponderance of the testimony, as I charge you in the other case, is meant that superior weight of evidence upon the issues involved which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

In determining where the preponderance of the evidence lies in these cases you may take into consideration the witnesses' demeanor on the witness stand, their interest or want of interest, or any other fact or circumstance that may legitimately appear to you from the witnesses' demeanor upon the witness stand.

Now, Lady and Gentlemen of the Jury, in a case of this kind the plaintiffs are not bound by any act of negligence on the part of the driver of this automobile. You will not be called upon to determine, as you will in the other case, if the driver of the automobile was filing this suit whether he would be prevented from recovering on account of his own negligence. These are the passengers and not the driver. I will restate that. In a suit of this kind the deceased is not bound by any act of negligence on the part of the driver of the automobile. You will not be called upon to determine, as you would have been had the driver of the automobile been filing this suit, whether he would be prevented from a recovery on account of his own negligence. The plaintiffs, or deceased in these two cases, were not the driver of the automobile. Leroy Beckham was the driver of the automobile,

therefore in this case the plaintiffs would not be guilty of any act of negligence, or would not be responsible for any act of negligence on the part of the driver of the automobile and would not be bound by it.

The only respect in which the plaintiffs owed a duty here of exercising care was that if the circumstances existing at the time demanded that he take some measure to prevent injury to himself and under the circumstances could have done so, then it would have been his duty to do so; and if he failed to do it, he would be charged with negligence himself in not exercising ordinary care for his own protection. But whether the circumstances were such at the time as to make it possible for him to prevent an injury by the exercise of ordinary care would be for this jury to say under the circumstances shown by the evidence.

Now, ordinary care is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. The absence of ordinary care is commonly denominated ordinary negligence.

As I charged you in the other case, a witness may be impeached in several different ways. Among them would be proof of contradictory or inconsistent statements about a material fact. Whether such witness has been impeached or not, is a question for the jury to determine because, as I stated, you are the sole judges of the credibility of the witnesses who have testified in your presence.

If the jury believes that a witness has been impeached, wholly impeached and unworthy, they would be authorized to discard his entire testimony; or, if they think he has been impeached in part and sustained in part, the jury may accept whatever portion

of the evidence they believe and discard that which they disbelieve. It all goes back to the same thing, Lady and Gentlemen of the Jury, that you are the sole judges of the credibility of the witnesses.

Now, in cases of conflicts in the evidence, and there are usually conflicts in contested cases, it is the duty of the jury, if it can do so, to reconcile the conflicts without imputing perjury to anybody, to any witness, reconciling them in any manner that you can consistently do so; but, if you cannot reconcile them, if you are unable to reconcile conflicts in the testimony, then it is for the jury to say what witness or witnesses you will believe and what witness or witnesses you will disbelieve. That is a matter solely within the province of the jury.

Now, I charge you that if the defendant was not negligent in any one of these respects as set out in these two petitions, then the plaintiffs would not be entitled to recover, even though they may have been injured. Recovery is allowed only in cases of negligence and only if there was negligence in one of the respects set out in the petition; and if you find from the testimony that the defendant was not negligent in any one of these respects, then you ought to find in favor of the defendant, regardless of the negligence of the driver of the automobile. If the defendant was not negligent, even though the driver of the automobile might have been negligent, you could not find against the defendant. However, if you find, as I said, from the testimony in the case that the defendant was negligent in either one or more of the respects alleged in the petition, then the defendant would be liable, which, of course, if the negligence of the defendant was the proximate cause of the collision.

In the event you should find that the defendant was negligent and that the plaintiff was also negligent, then you would apply what is known as the principle of comparative negligence. That rule is this: If both were negligent and equally negligent, the plaintiff cannot recover. If both were negligent but the defendant was more negligent than the plaintiff then the plaintiff can still recover but the amount of the recovery would be reduced in proportion to the amount of his negligence as compared with the negligence of the defendant.

If you find from the testimony that the defendant was negligent and that negligence caused the injury to the plaintiffs, and that the plaintiffs were not negligent, then I charge you that the plaintiffs would be entitled to recover damages for such injury.

Now, Lady and Gentlemen of the jury, as I said before, if you find that the defendant was negligent and the plaintiff was not, or that the defendant was negligent and the plaintiffs were negligent, but that the defendant was more negligent than the plaintiffs, then of course you would take up the amount of recovery. In other words, if you find that the defendant was negligent and that the negligence of the defendant was the proximate cause of this injury, and that the plaintiffs was not negligent then, of course, you should find for the plaintiffs. If you find that both the plaintiffs and the defendant were both equally negligent then you should find for the defendant. If you should find that both the plaintiffs and the defendant were negligent, but that the negligence of the defendant exceeded that of the plaintiff, then you should find for the plaintiffs, but you should reduce that amount to the amount of negligence attributable to the plaintiffs.

I charge you that if you believe from all the facts and circumstances or the situation as it existed at that time, the plaintiffs' sons were riding in the automobile should have taken some steps to protect themselves, and could have done it and failed to do so, if you think under that situation they could have done something to avoid injury to themselves, and the duty was on them to do it and they did not do it, why, then you would compare their negligence with the negligence of the defendant. That is what I meant by comparative negligence. Of course, if you think the circumstances were not such as to require any action on their part, or that under the circumstances there was not anything they could do to protect themselves, why, then the principles of comparative negligence would not be applicable at all. In other words, after all is said and done, it is all a question of fact for you gentlemen to determine under the evidence in the cases and the law as given you in charge by the Court.

I charge you, lady and gentlemen, that a person riding as a passenger in a car, driven by another, until he has had notice to the contrary assumes that neither the driver or others will be negligent, and he may also assume that the driver will exercise proper care to avoid the negligence of others. That while the negligence of the driver is not imputable to the passenger the passenger cannot close his eyes to known or obvious danger arising either from the acts of the driver, or from the acts of other where there is danger from either cause and the circumstances were such that it would become apparent to a person of ordinary prudence in like circumstances, then it is the duty of such passenger to do whatever a person of

ordinary prudence would or would not have done under the same or similar circumstances.

I charge you that in these two cases it is agreed that each of the plaintiffs were paid the sum of $6,000.00 by Leroy Beckham, Sr., on account of damages sustained by each of them resulting from the death of their son, therefore if you should find that either or both of these plaintiffs are entitled to recover any sum, and such sum exceeds the sum of $6,000.00, then I charge you that after ascertaining such sums you should deduct the sum of $6,000.00, which has already been paid on account of such damages. Of course, the Court is not implying as to who should recover or any fact pertaining to a recovery.

I charge you, lady and gentlemen of the jury, that a mother may recover for the homicide of a child minor or sui juris, upon whom she is dependent and who contributes to her support, unless said child shall leave a wife, husband or child. The mother shall be entitled to recover the full value of the life of such child.

The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived. The term "full value" means the gross sum the deceased would have earned to the end of his life, had he not been killed, reduced by you to its present cash value.

In arriving at the gross sum the deceased would have earned to the end of his life, had he not been killed, the jury should consider the age of the deceased at the time of his death, his health, occupation, habits, and surroundings, amount of money he was earning, his expectation of life, the probable loss of employment, voluntary abstinence from work, dull-

ness in business, reduction of wages, increasing infirmities of age, with a probable corresponding diminution of earning capacity, and any other causes which may reasonably contribute to the illustration of the gross earnings of a lifetime.

If the jury should find that the plaintiffs are entitled to recover, it would be their duty to first determine the gross value of the life of the decedent, and then to reduce that such to its present value, using as a basis of reduction seven percent per annum as the legal value of money in Georgia.

To illustrate: $100.00 due and payable today is worth $100.00 today. $100.00 due and payable one year from today would be worth today only that sum to which when you add seven percent per annum for one year would, principal and interest together, make $100.00.

To carry the illustration one step farther: $100.00 due and payable two years from today would not be worth $100.00 today. Neither would it be worth as much as $100.00 due and payable one year from today. It would be worth today only that sum to which when you add seven percent per annum for two years would, principal and interest together, make $100.00.

That is the principle by which unearned earnings extending into the future, should be reduced to present value.

There is in evidence a certain table known as a mortality table, which the jury may or may not use, as they may see fit. The purpose of this table is to show the expectation in life of the average person of a given age, as determined by the compilers of this table over a wide range of observation. The ages observed are listed in the first column, and the expectation in life for each age listed is found in the second column immediately opposite that age.

It cannot be assumed that the expectation in life of the decedent at the time of his death was that of the average person. It may have been more or it may have been less. What it was is a question for the jury to determine. In doing so the jury should look to the evidence, consider his age, habits of life, the state of his health, and any and all other facts which might reasonably tend to indicate his probable expectation in life at the time of his death.

Now, lady and gentlemen of the jury, I charge you that in all actions against the railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

As I stated before, the defendant would have the right to rebut this prima facie evidence by any testimony, either by the plaintiff or the defendant, in either of these cases.

Now, lady and gentlemen, the pleadings will be out with you, as I stated before, not as evidence, but for you to read over, if you so desire, and ascertain the exact contentions of the respective parties in these cases. There is also documentary evidence that will go out with you, and you will give that evidence the same weight and credit as you do the other evidence in the case.

There will be three cases for you to decide, three separate petitions, and you will have to render a verdict on each of the three separate petitions.

Now, if you find that Mrs. Leroy Beckham, Sr., is entitled to recover under the rules of law and the evidence in this case, the form of your verdict would be: "We, the Jury, find for the plaintiff so many

dollars", date it, and let one of your number sign it as foreman. If you find that she has not carried the burden, then you should find in favor of the defendant, and the form of your verdict would simply be: "We, the Jury, find for the defendant," date it, and let one of your number sign it as foreman. And the same instructions would apply in the case of Mrs. Woodrow Sapp vs. the Atlantic Coast Line Railroad Company, and in the case of Mrs. James H. Tyre vs. the Atlantic Coastline Railroad Company. You will have out with you three separate petitions and your verdicts should be written on each respective petition. In other words, as I said before, if you find for Mrs. Leroy Bekcham, Sr., your verdict would be: "We, the jury, find for the plaintiff the sum of blank dollars," date it and let one of your number sign it as foreman, and return it into Court. If you find for the defendant, of course, the form of your verdict would simply be: "We, the jury, find for the defendant," and you would likewise date it, and let one of your number sign it as foreman and return it into Court. The same procedure would be followed in the cases of Mrs. Woodrow Sapp vs. the Atlantic Coastline Railroad Company and in the case of Mrs. James H. Tyre, Sr., vs. the Atlantic Coastline Railroad Company.

Now, you may retire to the jury room, but do not begin your deliberations until I send you word by the Marshal, as I want to determine if there are any exceptions to my charge.

You may retire.

EXCEPTIONS TO THE CHARGE OF THE COURT.

The Court.
Any exceptions, gentlemen?

Mr. Highsmith:
I understood the Court to make one inadvertent statement and that was in the Beckham case, and I am willing for it to be correct. You said it should be reduced by the amount of negligence attributed to the defendant, when you mean the plaintiff.

The Court:
If I said that, I will correct it. How about it, Mr. Mr. Pedrick?

Mr. Pedrick:
That's all right, Your Honor.

Mr. Highsmith:
We except to the Court's charge on the so-called range of vision rule. The Court charged the jury if they found that the driver of the car was driving so fast he couldn't stop his car within the range of his vision there could be no recovery.

The Court:
I said "lights". I said within the range of his lights, didn't I?

Mr. Highsmith:
Well, the point we make is that the Fifth Circuit Court of Appeals has just held in the last few weeks that that is not an absolute rule of law. I know they held that in the Kammerer case, but they have ap-

parently changed their minds, and they have held in the last case that it is not an absolute rule of law, but may be considered by the jury as negligence on the part of the driver of the car.

The Court:

Wait a second, let me get that. I said that the driver of the car would be negligent if he drove his car at such a rate of speed that he was unable to stop the same within the distance of his lights under the conditions existing at that time. I thought that was the law.

Mr. Highsmith:

Well, we just except to it, Your Honor.

The Court:

Well, have you got that decision?

Mr. Highsmith:

It is a decision that came out three or four weeks ago.

The Court:

Well, let Larry see it.

Mr. Highsmith:

Judge Hutcheson reversed the Court in the Northern District of Florida some three or four weeks ago because they followed the Kammerer charge, that it was absolute liability, in other words there could not be any recovery if a man cannot stop his car within the range of vision, and—

The Court:
I didn't say that. I said that the driver of the automobile would be negligent

Mr. Highsmith:
In one of Larry's requests to charge you said he couldn't recover.

Mr. Pedrick:
That is a Florida rule, Your Honor, he is talking about. The Georgia rule, they have already passed on that.

The Court:
Here is what I charged: I charge you further that when an automobile driver knows that he is approaching a railroad crossing in the nighttime and fails to reduce his speed of the car so that the car may be stopped within the range of his lights when he discovers the train is on the crossing or passing over it would be guilty of such lack of ordinary care as would prevent a recovery from the railroad. I thought that was the law.

Mr. Highsmith:
No, sir, that is not the law. We just wanted to make an exception to it.

The Court:
All right, what do you say, Mr. Pedrick?

Mr. Pedrick:
That has been held, if Your Honor pleases, in the case of Pollard vs. Clifton, 62nd Ga. App., and the Fifth Circuit has quoted that case three or four times as the rule under the Georgia law.

The Court:
It looks like common sense.

Mr. Highsmith:
Well, it is our position that there is not a single case in Georgia, except one head-note that says that, and that is not referred to in the body of the decision at all.

The Court:
Well, I sure charged that in the Kammerer case.

Mr. Highsmith:
Yes, sir, but apparently they have changed the law.

The Court:
I am going to stick to it.

Mr. Highsmith:
Well, it is new law, as far as the Fifth Circuit is concerned. There are probably 25 Georgia cases—

The Court:
Well, I am going to stick with Judge Hutcheson. I am going to let it stand.

Mr. Highsmith:
We also except to the Court's failure to charge our Request No. "I" on Page 2. In other words, I have argued this with the Court before and he doesn't agree with me, but I want to get it in the record. The Fifth Circuit has held out-right in the Freeman case the proposition of law that if the acts of the driver of the car, in a suit by a guest, if the negligence of the driver of the car and the negligence of the rail-

road concur to cause the death then the railroad company would be liable for the full amount just as if it had been solely negligent.

The Court:

You mean if the driver of the automobile and the railroad were both equally negligent?

Mr. Highsmith:

No, sir. If the death of the guest was caused by the joint and concurring negligence of the driver of the car and the railroad, then the guest may recover against the railroad company just as if the railroad company had been solely negligent, in other words a joint tort feasor is jointly and separately liable, if you have two concurring there, and this happens to be a case exactly like this one where the railroad was sued and they claimed that the death was caused by the negligence of the driver of the car and the railroad, or it could have been found that was true, and the Fifth Circuit Court of Appeals have held that was true, and there are any number of Georgia cases.

The Court:

You mean if Mr. Beckham and the railroad company were jointly liable for the death of either one of these boys, is that what you mean?

Mr. Highsmith:

No, sir. If the negligence of the driver of the car, the Beckham boy, concurred, that is, happened at the same time as the negligence of the railroad company, they were both jointly and concurrently negligent then the rule of law in Georgia is, and it has been upheld in Georgia cases, and in the Fifth Circuit

Court of Appeals, the rule of law in Georgia is that the injured guest may sue the railroad company alone, or may sue the Beckham boy alone, either one, and if he proves the negligence of the two, joint concurrence, the negligence of the two was the proximate cause of his death, then he may recover against either one or both.

The Court:
Wouldn't you have to have a joint suit against them?

Mr. Highsmith:
No, sir. They didn't have it in the Freeman case.

The Court:
You would have to sue them both?

Mr. Highsmith:
No, sir. That is the point of law that I am telling you about that has been held in the Georgia cases and in this latest case. Here is the decision. It is the 193, F (2d).

The Court:
Read that to me.

Mr. Highsmith:
"Even if the collision was caused by the concurring negligence of the defendant (that's the Atlantic Coastline Railroad Company) and of the driver of the car, the defendant is liable for injuries to a non-negligent guest in the car to the same extent as though the damage had been caused by defendant's negligence alone. It is no defense for a wrongdoer that a third

party shared the guilt of the same wrongful act, nor can such wrongdoer escape liability for damage he has caused on the ground that the wrongful act of a third party contributed to the injury."

The Court:
What is the name of that case?

Mr. Highsmith:
It is the case of Atlantic Coast Line Railroad Company vs. Freeman, decided on December 14, 1951 by the United States Court of Appeals.

The Court:
What state did that case come from?

Mr. Highsmith:
The state of Alabama. There are plenty of Georgia cases to the same effect.

The Court:
What do you say to that?

Mr. Pedrick:
Your Honor, that would highly confuse the issues in this case, if Your Honor was to charge that. The defendant, Railroad Company, here has not taken the position in this case that because of concurring acts of negligence on the part of the driver of the car that the damages against the railroad should be reduced. That is not an issue here. That was what they were talking about there whether the driver was a party defendant or not. They said it is no defense there for the railroad to say that the concurring negligence of the driver of the car reduced the liability of

the railroad. That is not an issue in our case. Your Honor has charged this; that the negligence of the driver of the car would not be directly imputable to the passenger, but the passenger, of course, might be on his own part guilty of some negligence, and then you charged the comparative rule in both instances, and I think that is as far as the issues are in this case.

Mr. Highsmith:

We have any number of Georgia cases right in point. It is a general rule of law. Your Honor charged it in the Petroleum Carrier case.

The Court:

I think I did charge that in the Petroleum Carrier case.

Mr. Highsmith:

Yes, sir, and the question was then, after Slade got out, whether the jury could consider Slade's negligence, and you finally charged them that they could, that if it was joint and concurrent then they could recover against the Petroleum for the full amount, but reduce it by the amount that Slade paid. They settled and got out and then the case proceeded against the Petroleum.

Mr. Pedrick:

I imagine each one of them were blaming the other. Now, I will have to except to it if the Court charged that, because it would be highly confusing to the issues in this case. I think it would be error in this case because the issues are not raised in this case as they are in that case.

The Court:

Well, I am not going to charge that. I don't think it is applicable here. I think it would confuse the issues. All right, anything else now?

Mr. Highsmith:

We except to the Court's failure to charge our Request No. 4 on page 5, where a party has evidence in his power and fails to produce it—

The Court:

I have already ruled on that.

Mr. Highsmith:

Well, I have to put my reasons in, if the Court please, otherwise it won't be considered by the Court.

The Court:

All right.

Mr. Highsmith:

We except to the Court's failure to charge that Request for the reason the evidence shows that the railroad company had four members of the crew present here in Court under subpoena and did not offer them as witnesses and the presumption therefore arises, under this law, that our charge or claim was well founded.

The Court:

All right, what else?

Mr. Mozingo:

Your Honor, this is not an exception. This is just a suggestion. I don't think the gentlemen will object to

it, and that is this one here. (Handing request to the Court.)

The Court:

I think I charged that in different words. I think I have got all of that covered. Is there anything else, Mr. Highsmith?

Mr. Highsmith:

You didn't charge the language of the Bailey case there in the case of the two guests. You did in the Beckham boy case but you didn't in the other two, that we can't recover unless there were unusual circumstances. You charged it in the Beckham case but not in the others.

The Court:

All right, I will charge that.

Mr. Pedrick:

In that instance he was referring to his Request No. 3 and—

The Court:

About being hazardous?

Mr. Pedrick:

Yes, I was going to except to that where you had charged it in the Beckham case. If you bring the jury back and charge them that with respect to the other two cases then I have got to make another exception, but if you will let me make my exception to all three, but as far as I am concerned it can be considered as given.

Mr. Highsmith:
Well, that's good. That's fine.

Mr. Pedrick:
Subject to my exception.

The Court:
In other words, you are excepting to what I am now about to give in charge with reference to the other two cases, but not the Beckham case?

Mr. Pedrick:
Well, I was going to except to it where you charged it in the Beckham case. If it is satisfactory with counsel you can consider that you gave it in the other two cases and let my exception here to go all three of them and just save a little time.

The Court:
All right, let the record show that. Anything else?

Mr. Pedrick:
Yes, I am just getting to that now.

The Court:
I though you had already done it.

Mr. Pedrick:
No, I am just now getting to it.

The Court:
All right, go ahead and make your exception.

Mr. Pedrick:

Now, we do except, if Your Honor pleases, to Your Honor's charge in each of the three cases, as outlined in Plaintiff's request No. 3, respecting proof of conditions surrounding the crossing in question at the time of the collision which rendered that crossing more than ordinary dangerous and that such facts was known to members of the crew, and then defining what is an ordinarily dangerous crossing to be one whose conditions is such a reasonable prudent person could not use the same with safety, and then the remainder of it which, in substance, says that the crossing may be dangerous at one time and more dangerous at another time which would a particular effort or warning at a more dangerous time. We except, if Your Honor please, because that condition is not shown here by any evidence. Counsel is taking that ch' .ge from a case that goes up from Texas, which establishes the rules of the Texas Courts, that a crossing may not be dangerous at one time and more dangerous at another, which would cause in that more dangerous time for the crew to take a particular step at that time. Now, if Your Honor please, there is no evidence—

The Court:

Wasn't there evidence that they put out flares at sometimes and did not at other times?

Mr. Pedrick:

I think one witness said that he had seen them do it.

The Court:

There was evidence, as I remember, that they put out flares at one time and did not put them out at another time.

Mr. Pedrick:

But we say that the evidence does not justify a charge that there was, that there might have been something that we could have done and didn't do.

The Court:

I think it is a question of fact for the jury.

Mr. Pedrick:

All right, sir, that is one exception.

The Court:

All right, what else?

Mr. Pedrick:

Now, we except to Your Honor's charge in all these cases of the provisions of Section 94-110 of the Code of Georgia, which is all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

The Court:

I also charged that it could be rebutted either by the evidence of the plaintiff or the defendant.

Mr. Pedrick:

Yes, Your Honor did add the provision that it could be rebutted by testimony on the part of either the plaintiff or the defendant, but we say, if Your Honor pleases, that the charge of that Code Section, even with the modification, with the right to rebut it, is not a proper charge to the jury in this case, because this section of the Code has been construed to mean that where there is no evidence to the contrary of any negligence of the defendant, there is an inference, it is an inference of evidence. but it vanishes when there is any evidence in the record to the contrary, then our Courts, our Georgia Courts, have followed the Supreme Court of the United States and the Mississippi Rule that it is error to submit to the jury this question of the shifting of the burden. The Court cannot charge it.

The Court:

I didn't say anything about shifting the evidence. I said prima facie evidence, under that decision that Mr. Highsmith read this morning.

Mr. Pedrick:

I understand, Your Honor, but I just want to get it in the record, because it was argued. Your Honor permitted them to argue it to the jury, but it is not a proper charge, because the Court determines whether there has been any evidence introduced to the contrary regarding the negligence of the defendant, and when the Court determines that he can't charge that and leave it to the jury to use that as a presumption

The Court:

Certainly I can not state to the jury what has or has not been proven. That is always a question of fact for the jury to say. That is a question for the jury to say whether any evidence has been introduced to that effect or not.

Mr. Pedrick:

That, of course, was charged in all three cases.

The Court:

Well, I was going to direct a verdict for you all this morning until Mr. Highsmith came up with that decision. I had every idea of doing that.

Mr. Pedrick:

Well, Mr. Highsmith has not convinced us yet.

The Court:

Well, I can't go back on the law.

Mr. Pedrick:

I have one other exception, if Your Honor please, and that is the failure of the Court to charge our request No. 7 in each of the cases, that the failure of the railroad company to provide lights or reflectors on the side of the cars of the train as it passes over a crossing is not negligence.

The Court:

Well, I think you may be right about that. Wait a minute. Let me see it.

Mr. Pedrick:

Counsel argued it, if the Court pleases.

Mr. Mozingo:

They admitted in their admissions that there were not aluminous markings there. We don't care, Your Honor if you charge them that.

Mr. Highsmith:

It is not negligence as a matter of law, Your Honor, but it may be negligence as a matter of fact.

The Court:

Well, I think I have both sides contentions. Bring the jury back.

ADDITIONAL INSTRUCTIONS TO THE JURY BY THE COURT.

The Court:

Lady and Gentlemen of the Jury, there is just one thing that I omitted to charge you, but which I now give you in charge: The failure of the railroad company to provide lights or reflectors on the side of the cars of the train as it passes over the crossing is not negligence.

Now, with that additional instruction, lady and gentlemen of the jury, the case is going to be put in your hands under the rules of law which I have given you in charge, and under the evidence in the case. And as I have said before, it is all a question of fact for you members of the jury to decide whether or not the plaintiffs have carried the burden of proof in this case by a preponderance of the testimony as to whether the defendant, Atlantic Coast Line Railroad Company, was guilty of any one or more of the acts

of negligence as alleged in these petitions of the plaintiffs, and whether or not that negligence, if any, was the proximate cause of the death of these three sons of the plaintiffs. You may take the documentary evidence with you and you will give it just the same weight and credit and under the same rules of law as the other evidence in the case. It is all solely a question of fact for you all to determine, and with those instructions you may retire and begin your deliberations.

Mr. Highsmith:

Just a minute, Your Honor, you omitted to charge the Bailey case, which you said you would charge.

The Court:

Oh, I beg your pardon, Way. I knew there was something else, which I thought I had charged in the second case, but which I did not. I charged it in the first case, but inadvertently forgot to charge it in the second case.

Lady and Gentlemen of the Jury, you are instructed that in order for the plaintiffs to recover it must be established by a preponderance of the evidence that the conditions surrounding the crossing in question at the time of the collision was such as to render that crossing more than ordinarily dangerous, and that such fact was known to the members of the crew, the railroad crew, or should have been known to them by the exercise of ordinary care. A crossing is more than ordinarily dangerous if the condition is such that a reasonably prudent person could not by the exercise of ordinary care use the same with safety, unless the railroad employees need to give warning of the presence of a train on the crossing. It is not necessary

that the crossing be more than ordinarily hazardous a all times. Conditions surrounding a crossing may change materially from time to time. A warning of the presence of a train on the crossing might not be required under the law at one time, and yet it might be negligent to fail to provide it on there at another time. The question for your determination is whether or not at the time of this accident the conditions surrounding the crossing in question rendered it more ordinarily hazardous or unusually dangerous. That all, of course, is a question of fact for the jury alone to determine.

The Court:
Any further exceptions, gentlemen?

Mr. Highsmith:
No, sir.

The Court:
Mr. Pedrick?

Mr. Pedrick:
I have no further exceptions except what I made before the jury came back awhile ago.

The Court:
All right, let the record show that there were no further exceptions.
All right, Lady and Gentlemen of the Jury, you may retire and begin your deliberations.

(End of Charge.)

ORDER APROVING CHARGE OF THE COURT.

The foregoing 39 pages of typewritten matter are hereby approved as a true and correct transcript of the charge of the Court as delivered in the trial of the cases of Mrs. Woodrow Sapp, vs. Atlantic Coast Line Railroad Company, Mrs. James H. Tyre vs. Atlantic Coast Line Railroad Company, and Mrs. Leroy Beckham, Sr., vs. Atlantic Coast Line Railroad Company in the United States District Court for the Southern District of Georgia, Brunswick Division, March Term, 1956.

Ordered, That Same Be Filed as a part of the record in said case.

This 9 day of August 1956.

F. M. SCARLETT,
Judge U. S. District Court.

In the District Court of the United States, Southern District of Georgia, Brunswick Division.

Civil Actions 292, 293 and 294.

Sapp, Tyre, Beckham,
vs.
Atlantic Coast Line R. R. Company.

We hereby stipulate that we have examined the foregoing transcript of the proceedings at the trial and

have agreed upon the delineation and omission of irrelevant matter as indicated.

This 5 day of October, 1956.

(S.) LARRY E. PEDRICK,
Attorney for Appellant.

Waycross, Georgia.

(S.) E. WAY HIGHSMITH,
Attorney for Appellee.

Brunswick, Ga.

Filed in Office October 5, 1956.

MARY R. CROSS,
Deputy Clerk.

I certify the foregoing is a true and correct copy of the original now remaining of file and of record in my office.

This 6th day of October 1956.

EUGENE F. EDWARDS,
Clerk, United States District Court,
By MARY R. CROSS,
Deputy Clerk.

(Seal)

A TRANSCRIPT OF THE PROCEEDINGS.

Filed in Office Aug. 9, 1956.

(Title Omitted.)

In the United States District Court for the Southern District of Georgia, Brunswick Division.

Mrs. Woodrow Sapp,
vs. No. 292.
Atlantic Coastline Railroad Company.

Suit for damages.

Mrs. James H. Tyre,
vs. No. 233.
Atlantic Coastline Railroad Company.

Suit for damages.

Mrs. Leroy Beckham, Sr.,
vs. No. 294.
Atlantic Coastline Railroad Company.

Suit for damages.

Appearances:

For the Plaintiffs: Highsmith & Highsmith, Attorneys at law, Gordon Knox, and J. P. Mozingo, Attorneys at law.

For the Defendant: Bennett, Pedrick & Bennett, Attorneys at law, and Reese, Bennett & Gilbert, Attorneys at la.w

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WINEBERT FLEXER, sworn for the Plaintiff, testified.

Direct Examination.

By Mr. Mozingo:

Q. You Mr. Winebert Flexer?

A. Yes, sir.

Q. Mr. Flexer, where do you live?

A. Brunswick, Georgia.

Q. How long have you lived in Brunswick?

A. All of my life.

Q. How old are you?

A. 34.

Q. What is your occupation or profession?

A. I am an attorney at law.

Q. You practice here?

A. Here in Brunswick.

Q. Here in Brunswick, Mr. Flexer, have you had an opportunity to make a study of the Pyles Marsh crossing?

A. I did some years back.

Q. Did you have occasion sometime around October 25th, 1951, to make a study of it, in that general area, not that particular date?

A. In the fall of 1951. That was the time when we made the study.

Q. That was after the three boys were killed at the Pyles Marsh crossing?

A. In my capacity, sir, was—the group I was with, made a study of that crossing in the fall of '51 before this particular accident, as I recall, and right after this particular accident.

Q. Before and after this particular accident?

A. Yes, sir.

Q. Are those details still generally in your mind as to the terrain there?

A. As to the terrain, I recall how it looked. That is as far as I can say, if that's what you mean.

Q. If I was to show you a model of the Pyles Marsh Crossing, purporting to be a model as it existed at that time, do you think you could identify it as to whether it was true and accurate representation of the crossing at that time?

A. I believe I could, sir.

Q. On what highway is that crossing located on?

A. That is the Brunswick to Jesup state highway.

Q. Would you step down here and show the jury and the Court which is that highway? Turn it around this way. Come right around over here, please, sir. Now, would you show us where U. S. 25 was at that time?

A. I am not positive that the Brunswick to Jesup Highway is named U. S. 25.

Q. All right, sir.

A. However, this very closely resembles what is known as the Pyles Marsh Crossing, where the Jesup Highway crosses the railroad at the Pyles Marsh Crossing.

Q. All right, sir. Now, do you know the names of any of these other buildings out there?

A. This is the Paradise Grill, I believe it is called. And this is going northwesterly toward Jseup. This is the church that was there, and there is a large house there, a colored house over there on the left.

Q. Now, then, in approaching the Pyles Marsh Crossing at that time, were there underbrush on the right-hand side of the road going toward Jseup?

A. This is very close to my recollection as to the way the area looked back at that time. I say that

because I definitely remember that the County Commissioners cleared out this area with a bulldozer after this accident.

Mr. Pedrick:

Now, if Your Honor please, we object to any evidence of any activity other than at the time of this accident.

The Court:

I sustain your objection. Gentlemen of the jury, you will not consider any evidence relative to the situation that existed out there at anytime after the accident in question.

Q. Now, as to the time before the accident was all of this brush and things there?

A. Yes, sir. Now, I might say there was more brush as you cross the railroad track at the Pyles Marsh Crossing, going toward Jesup. There was more brush in this area. I believe it was a little higher in this area right here. I definitely remember that you could not see the railroad until you were right on it, coming from Brunswick, coming from this way, (indicating on model), especially from Brunswick. There was quite a block in here that you couldn't see it.

Q. Have you actually driven out there yourself to make those tests?

A. Yes, sir.

Q. All right, sir, then would you say that this is a true and accurate representation of the conditions that existed there prior to the time of the accident?

A. Yes, sir, I would.

Cross Examination.

By Mr. Pedrick:

Q. Mr. Flexer, does that model contain all the signals that were on the highway out there on October 25, 1951?

A. May I look at it again?

Q. Yes?

A. I believe it does, yes.

Q. Do you recall definitely that there was what is known as an "X" or cross buck sign, that it was there at that time?

A. I honestly can't recall the approach going northwestward toward Jesup, sir. I tried to a moment ago. I do recall there was some sort of a sign on this side. These were reasons that I do recall that, but I honestly can't recall the signs on the southerly side.

Q. Then you cannot say, Mr. Flexer, that that represents as closely as possible what the view was going from Brunswick toward Jesup?

A. As regard to terrain, I can, but with regard to that particular sign, I cannot.

Q. As regard to other signs, can you?

A. As regard to the terrain, sir.

Q. What do you mean by terrain?

A. The land, the road, the houses, the shrubbery and trees, but as regard to the signs on the southern approach—

Q. —the shrubbery that you were testifying about, you said it was thicker on the Jesup side of the crossing than it was on the Brunswick side, did you not?

A. No, sir.

Q. You did not?

A. No, sir.

Q. What did you say with reference to that?

A. I said that the shrubbery on the Jesup side was thicker at that time than it is on this model.

Q. That is on this model?

A. Yes, sir.

Q. So this model really doesn't represent the conditions at that time?

A. Yes, sir, by and large, it does, with that exception.

Q. What about the scale? Do you know anything about a scale, where the trees are there with respect to this particular model?

A. I can't honestly say, sir, that I can truthfully say to the very foot or inch that those trees are now exactly on this model as they were then, but to the best of my recollection the area was very woody on both sides of the railroad and the brush was very thick and to the best of my recollection this model does portray fairly accurately the conditions.

Q. Do you recall the highway sign nearer to Brunswick than this sign here? You do recall that there was a highway sign denoting a railroad crossing?

A. On this side here?

Q. Yes, sir?

A. No, sir, I don't.

Q. Do you say there wasn't one there?

A. I don't recall, sir. I couldn't say that there was or was not. I don't recall.

Q. Did you give the party who made that model the information from which to make it?

A. No, sir.

Q. You hadn't seen it until this morning?

A. No, sir, I had not seen it until this morning, and I didn't know of its existence until this morning.

Q. I have a photograph that I would like to have identified as "D-1" for the purpose of identification. Mr. Flexer, do you recognize that scene in that photograph identified as "D-1"?

A. It looks very similar to the Pyles Marsh Crossing, Mr. Pedrick.

Q. Which direction would the highway be going in that picture?

A. It appears to me, as near as I can make out in the picture, that the highway is heading northwest toward Jesup.

Q. Now, in the fore ground of that picture, do you see a highway sign denoting a highway or railroad crossing?

A. Yes, sir.

Q. Do you see that on this model here?

A. No, sir.

Q. Now, from that—

A. —may I say that there are two signs. I presume you are talking about—

Q. —in the extreme right there. The one in the extreme right there, the disc sign that says "R.R."?

A. I see that in this picture, but I do not see that on this model.

Q. As far as that photograph is concerned it indicates that picture is much closer to Brunswick than the first sign that they have on this model, isn't it?

A. I will have to ask you to repeat that, sir.

Q. I say, the disc sign, denoting an approach to a railroad crossing, the disc sign "RR", in that picture it shows much closer to Brunswick than the first sign they have here on this model, this square sign here on this model?

Mr. Mozingo:

Your Honor, we object to the picture on the ground that it was not made before the accident and was not made immediately after the accident and the situation and signs were changed at the time the photograph was taken.

The Court:

What do you say to that?

Mr. Pedrick:

Your Honor, I am asking him if he recognizes that photograph and asking him what appears on that photograph that does not appear there, and I will show that that photograph was made the day after the accident—I mean the day of the accident.

Mr. Mozingo:

All right. That's all right.

The Witness:

Mr. Pedrick, I want to answer your question, but may I ask you, do I understand that you are asking me whether this sign here shows that the other sign is closer—well, will you repeat your question?

Q. I asked you if the sign "RR" there in that picture is not closer, indicated to be closer by that picture, closer to Brunswick and further removed from the railroad than the first sign they have here on this model?

A. I can't answer that, sir.

Q. Don't you see, Mr. Flexer, that behind that disc sign is a square board sign?

A. Yes, sir.

Q. So that a motorist would first reach that disc sign before they reached this square here?

A. Yes, I agree with you, but I didn't quite understand your question. This disc sign on this picture is further away from the railroad than this crossing sign is.

Q. And it is not shown on this model?

A. No, sir. This sign is not shown on this model.

Q. Now, will you notice that "D-1" again, Mr. Flexer, and tell me whether or not that represents the condition of the undergrowth, or whatever you denominated it, on the side of the highway right up through there—the terrain?

A. Mr. Pedrick, I am having difficulty on this picture of orientating myself. I can't see just where the railroad tracks are because of shadows here, and consequently I am not too clear on it. I see a building which resembles the old Paradise Grill and it looks as if we are looking toward Jesup, going from Brunswick, and the terrain and area resembles the Pyles Marsh Crossing, but I can't see the railroad tracks.

Q. On account of the shadows?

A. Well, I am not sure. I can't see it.

Q. You don't know whether there is a railroad crossing there or not?

A. Not according to this picture, I don't. I can't see it.

Q. I have another photograph here and ask that it be identified as D-2 and another one as D-2 and another one as D-3. Now, look at D-2. You can compare them, if you want to, Mr. Flexer, and see if that refreshes your recollection about the arossing?

A. This photograph is clearer, Mr. Pedrick, than this one.

Q. Which one are you referring to?

A. D-2, apparently. This one, I can see the railroad crossing in this area here, sir, and this looks very much like Pyles Marsh Crossing.

Q. And does it look like the terrain that you were talking about on October 25th, 1951?

A. This picture does not resemble as regard to underbrush on the right side as you approach the railroad from Brunswik, and as regard to underbrush on the right side as you approach the railroad from Jesup toward Brunswick. It does not resemble the conditions in the fall of 1951 before this accident.

Q. Now, this D-3, is that a view of the same crossing but closer to the crossing?

A. Yes, sir.

Q. In what way does that not resemble the conditions in October, 1951?

A. One thing I see right off, sir, this stop sign here does not resemble the conditions in the fall of 1951.

Q. Which one is that?

A. I just do not recall this stop sign being there, and this rail crossing sign here in this picture does not resemble the same rail crossing sign in this position as it was in the fall of 1951. Now, the terrain, the brush, in this picture, on the right side, as you approach the railroad coming from Jesup toward Brunswick, does not resemble the brush as it was in the fall of 1951 before this accident. It looks as though it has been cut off or cleared more. I believe that is as near as I can tell you, sir, as to how this differs from the way I recall it.

Q. This model here itself, according to your evidence, does not have the same potrayal of the conditions with respect to the underbrush you testified about?

A. It does, sir, as regards the approach from Brunswick to the railroad. That brush there is a very close portrayal according to my recollection. Now, on the approach, on this side of the model, from Jesup toward Brunswick, by the Paradise Grill, the model does not reflect the exact condition as it was then because the underbrush was high at that time, or higher at that time, in that spot, than the model shows it.

Q. You are not saying that the trees or the brush on the Brunswick side of that is at the same height as it was in October, 1951, assuming that model to be drawn to a scale—I mean you don't know whether it was drawn to that scale? You don't know how high the trees were?

A. Not to the inch or foot, sir.

Q. How about to the yard?

A. I couldn't tell you how high the trees were.

Q. You don't know whether that represents the true condition there in every essential particular, do you?

A. I recall, sir, that the approaches on both sides of the railroad were heavily wooded with trees and with underbrush and undergrowth. I recall that very definitely.

Q. And were not like they are in these pictures? I would not say at all, sir, but as I said a moment ago, it appears that these pictures were taken after the brush was cut back, which, of course, I recall it was done.

Re-Direct Examination.

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By Mr. Mozingo:

Q. Mr. Flexer, I believe you are in the same position as the jury. I believe you said you had never seen this model before this morning?

A. That's right.

Q. And do you recognize it as being the Pyles Marsh Crossing?

A. I do, sir.

Q. Now, don't tell any of your findings or anything, but why or in what capacity did you go out there to make a study?

In the Presence of the Jury.

Q. Mr. Flexer, don't tell for what you went there for, just answer this one question. In connection with the study you made of Pyles Marsh Crossing was not made by you as a personal matter or for a professional purpose as an attorney?

A. No, sir.

Mr. Mozingo:
That's all

The Court:
All right, you may go down. Call your next witness.

Mr. Mozingo:
Call Mr. Warren Neal

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WARREN R. NEAL, Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Mozingo:

Q. Where do you live, Mr. Neal?

A. I live in Brunswick, at 1919 Walnut Avenue.

Q. How long have you lived here?

A. Approximately five years.

Q. Do you occupy some official position, or hold some official job here, with the county?

A. Yes, sir.

Q. What is that job?

A. At this moment I am Consulting Engineer for Glynn County, and Engineer in charge of the St Simons Causeway.

Q. I see. Did you have an official job with Glynn County in 1951 in the month of October?

A. Yes, sir. I was Executive Clerk and Chief Engineer.

Q. In that official capacity, were you familiar with the roads in Glynn County?

A. I was familiar with most of them.

Q. Were you familiar with what is known as Pyles Marsh Crossing on U. S. 25 at that time?

A. Yes, I was.

Q. Now, Mr. Neal, without going into too much detail, how were you familiar with it? Did you go out and visit Pyles Marsh Crossing on several occasions?

A. Yes, sir, I went out when the question of signs came up and—

Q. All right, sir. Now, Mr. Neal, you made a trip there, you say?

A. Yes, sir.

Q. Did you make a study and look around the Pyles Marsh Crossing?

A. Not too carefully.

Q. Well, let me ask you this—first, would you mind stepping right down here before the jury. Now, do you recognize this as a model of that area there?

A. Yes, I do.

Q. And this is toward Jesup?

A. Yes, sir.

Q. That is toward Brunswick?

A. Yes. This is Smith's property.

Q. Whose property is that?

A. Mr. Smith.

Q. Mr. Fred Smith?

A. Yes, sir.

Q. Do you know what this road here was that crosses the tracks there?

A. I don't recall a crossing of the tracks. There was a road down here—well, I don't remember that particular feature right there.

Q. Yes, sir. Was there an old road out there at one time?

A. I couldn't tell you.

Q. All right, looking at this model as to the brush and the highway and the angle, do you know the angle at which the railroad crosses the highway there?

A. I would say that is fairly accurate.

Q. You would say that is an accurate representation?

A. I would say so.

Mr. Mozingo:

All right, sir, I believe that's all.

Cross Examination.

By Mr. Pedrick:

Q. In your examination of this so-called model, does it contain all of the signs that were on the highway coming toward the crossing when you were coming in the direction of Brunswick from Jesup?

A. My recollection isn't accurate enough to answer that question.

Q. I present to you photograph that has been identified as D-1 and ask you if you recognize that?

A. Yes, I recognize that.

Q. What is it, Mr. Neal?

A. That's Mr. Smith's property on the right and the residence on the other side of the crossing there.

Q. Well, is that what is known as the Paradise Grill, when you say it is on the other side of the crossing?

A. That seems to sit back pretty far from the crossing, that building, to be the Paradise Grill, or restaurant. That looks like a residence sitting back there.

Q. Beyond the crossing, as shown in that. You don't know exactly what that is?

A. No, sir.

Q. Does this photograph, marked D-3, make it any clearer to you?

A. Yes, that is clearer.

Q. Does that show what that white building is?

A. Yes.

Q. What do you say that is? Is that the Paradise Grill there?

A. Yes.

Q. Now, in this D-1, on the extreme right of that picture, do you see a disc that has some letters on it? Is that the one?

A. Are you speaking of the railroad crossing sign there?

Q. It's on the highway before you get to the crossing. Do you recall that sign being there?

A. No, I do not.

Q. You do not?

A. No, sir.

Q. Now, in identifying this model here, what would indicate to you, Mr. Neal, that would give you the impression that was the Pyles Marsh Crossing, not remembering any signs or anything? What would cause that, the church?

A. No, the fact that I went out there when we started clearing out there with the county forces.

Q. Now, the Judge has ruled that you cannot say anything that was done subsequent to October, 1951. But I say, what would cause you to recognize that particular setting as the Pyles Marsh Crossing? What land marks, if any?

A. My visit to the project and—

Q. —Any buildings or anything?

A. Yes.

Q. What would this be?

A. That's a residence there, or restaurant.

Q. Do you recall whether or not there were any neon signs on that restaurent?

A. No, I do not.

Mr. Pedrick:

That's all.

The Court:

All right, you can go down Call your next witness.

(Witness excused.)

ROBERT W. ROZIER, Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Mozingo:

Q. What is your name?

A. Robert W. Rozier.

Q. Mr. Rozier, where do you live now?

A. I am traveling right now on the road up in the middle part of Georgia and the upper part of the state.

Q. What is your business?

A. I am a Bible Salesman.

Q. In October, 1951, where did you live?

A. I was living out here at the Paradise Grill.

Q. Now, Mr. Rozier, how long had you been living at the Paradise Grill?

A. I had been living there about seven months. They had just built the place and opened it up.

Q. Now, were you operating the place?

A. Yes, sir.

Q. Managing the place?

A. Yes, sir.

Q. What is the Paradise Grill?

A. A restaurent and grill. They serve food, cold drinks, cigarettes and stuff.

Q. Before you came to Brunswick—where were you born, in Georgia?

A. Up here between Brunswick and Darien. I have lived most all of my life in this section.

Q. In other words, you have lived most of your life here in this section?

A. Yes, sir.

Q. Are you familiar with the crossing there known as the Pyles Marsh Crossing?

A. Yes, sir.

Q. Mr. Rozier, what highway was the Pyles Marsh Crossing located on in 1951?

A. Highway 25.

Q. What is it known as now?

A. Known as 341.

Q. And what towns does it connect?

A. Brunswick and Jesup.

Q. Now, what sort of highway is that with reference to travel?

A. Well, there is a right good deal of traffic over it at all times, especially since that route had been put through there by Jesup and Nahunta, because tourists get lost in coming from Brunswick and first one way and another in trying to get back on 341 up there.

Q. Now, would you say that it is a heavily traveled highway?

A. Yes, sir, with the pulpwood trucks and different people hauling things and tourists.

Q. Is it one of the main highways leading into the Island?

A. Yes, sir, from north Georgia.

Q. Now, Mr. Rozier, are you familiar with the territory out there around Pyles Marsh Crossing?

A. Yes, sir.

Q. If I show you this model could you tell us if it is a true and accurate representation of the area around there?

A. Yes, sir.

Q. Would you mind stepping down here, please? Would you mind pointing out to the jury—what is this place right here?

A. Paradise Grill.

Q. Is that the place that you were operating?

A. Yes, sir.

Q. All right, now what is this road right here?

A. It is an old road that came in here and cut off at the railroad. It is an old road that they cut out and discontinued it altogether.

Q. Is it a concrete road?

A. Yes, sir.

Q. What was that old road, if you know?

A. It was the old road going into Jesup.

Q. All right, sir, what is this sign right here?

A. That is the Pamerlee Restaurant.

Q. All right, what does the sign have on it about distance?

A. "10 miles to Brunswick."

Q. Is that about the right distance to Brunswick?

A. Yes, sir.

Q. All right, what is this building here?

A. A colored church across from the crossing there.

Q. All right, do you recall a house being there?

A. Yes, sir, there is a house there, and another is supposed to be up there.

Q. Another house would be back in this area?

A. Yes, sir.

Q. There are also some houses behind the Paradise Grill?

A. Yes, sir.

Q. Where would they be?

A. They would be back over here.

Q. In other words, you would have to extend the model out for those to be on there?

A. Yes, sir.

Q. Now, do you know who owns this property in here, or owned it in October, 1951?

A. Well, a fellow Smith.

Q. Now, is there a road that goes off here as you cross the crossing itself and turn to the right, is there a road there?

A. Yes, sir.

Q. What type or road is that?

A. Just a dirt or sand road.

Q. Does the railroad cross the Pyles Marsh Crossing at about this angle?

A. Yes, sir, at about that angle.

Q. Have you been out there and looked at the crossing and were you familiar with it in October, 1951?

A. Yes, sir.

Q. All right, sir. Now, what would you say as to this being a true and accurate representation of the area out there?

A. Well, I don't see how you could make anything more truer, only back in here was some thick woods next to the railroad tracks. You couldn't see a thing as you came up to this crossing here. You just couldn't see a train back down in here, in this cut where it comes up to this crossing. It wouldn't look any more perfect than that.

Q. All right, sir. You can go back up and have a seat on the witness stand. Now, in October, 1951, you say you were familiar with the crossing?

A. Yes, sir.

Q. Did they have any gates there, that let down, electric gates, to stop the traveling public at this crossing?

A. No, sir.

Q Did they have any electric blinker signals?

A. No, sir.

Mr. Pedrick:
Your Honor, we will admit that, so he won't have to bring it out with every witness. We admit that we did not have any gates or automatic blinkers.

Mr. Mozingo:
Well, do you admit that there were no warning signs there at all?

The Court:
He said he would admit those two things. Tell me again, so there won't be any misunderstanding.

Mr. Pedrick:
We admit that there were no blinker lights and no automatic gates.

Mr. Mozingo:
All right, do you admit that there was no flagman there?

Mr. Pedrick:
We did that in our answer.

Mr. Mozingo:
All right, sir, do you admit that there were no warning lights of any kind out there?

Mr. Pedrick:
I will say this, I want to be fair to my friend and I want to be fair to the jury and to the Court. There was no permanent light out there, if that is what you are referring to. I will admit that. I am not referring to what was there on this particular occasion, but only as to permanent lights.

Mr. Mozingo:
All right, sir.

Q. All right, now, Mr. Rozier, during the time that you operated the Paradise Grill, did you have occasion to see trains go by there?
A. Yes, sir.
Q. Do you know where this track leads to?
A. Waycross.
Q. Which direction is Waycross?
A. West.
Q. West?
A. Yes, sir.
Q. And which way is the road going from Brunswick toward Jesup? Which way is that?
A. Northeast.
Q. And then this end of the railroad would be west?
A. Yes, sir.
Q. All right, sir. Now, what type or trains usually operated on that track?
A. Well, freight trains in the neighborhood of 75 or a 100 cars loaded with pulpwood and stumps for Hercules and a few other cars amongst the train.
Q. What was the color of those gondola cars that hauled stumps?
A. Black.

Mr. Pedrick:
Your Honor, we object to what happened on any other occasion but this one in question.

The Court:
What do you say?

Mr. Mozingo:
That's all right. We will limit it to this occasion.

Mr. Pedrick:
Your Honor, we object in advance and I am putting my friend on notice about injecting into the case evidence that he knows is illegal and then withdrawing it. He is a skilled trial attorney and he knows better.

Mr. Mozingo:
I think it is perfectly competent to prove it and I will connect it up.

The Court:
Well, I will hold that anything that happened before or after this accident would be inadmissible unless it tends to show what occurred on that particular night. I think you will agree with me on that, won't you, Mr. Mozingo?

Mr. Mozingo:
Yes, sir, they answered in their interrogatories as to what happened on this occasion and I will read those to the jury.

The Court:
All right.

Q. On this particular occasion, Mr. Rozier, were you there on the night of October 24th and the morning of October 25th, 1951?
A. I was.
Q. Where were you at that time? Were you at the Paradise Grill?

A. Yes, sir.

Q. All right, sir. On occasions before when they had come by this crossing—you had seen trains pass over the crossing on nights before?

A. Yes, sir.

Q. Had you ever seen them throw out fuses?

A. Yes, sir.

Q. Do you know what a fusee is?

A. Yes, sir.

Q. All right. Now, on this particular night, did you see the train that was involved in this particular accident?

A. Yes, sir.

Q. Where were you at the time you saw this particular train?

A. I was sitting at the counter, on a stool.

Q. All right, whereabouts?

A. Well, it was right in the center of the building, the counter is, right by two doors, and about the second seat from the end next to the two doors, next to the railroad.

Q. How could you see through the front of the building there?

A. Well, there was a plate glass window.

Q. All right, sir. Did you hear the train as it approached?

A. Yes, sir.

Q. Did you see the engine as it came by?

A. Yes, sir.

Q. Did you see any fusees dropped from the engine?

A. No, sir.

Q. If there had been a fusee there could you have seen it?

A. Yes, sir. I was looking straight out at the crossing.

Q. You know what a fusee is, don't you?

A. Yes, sir.

Q. Have you ever seen one burning?

A. Yes, sir.

Q. Was there one burning there that night after the engine went across the crossing and before the accident occurred?

A. No, sir.

Q. You are positive about that?

A. Yes, sir.

Q. Now, when the engine went on across, did you see the cars of the train?

A. Yes, the train went right on around kinda by the front of the door, where I was sitting right about even with the door, and when it went by I seen all kind of sparks and things all lit up under the train. I didn't know what it was at that time.

Q. The cars that you saw go by there that night, I am talking about the railroad cars, what type of cars were they operating over that track that night?

A. Well, different kind of gondola cars.

Q. What is a gondola car?

A. It is about a three-quarter car. There is what they call a small gondola and a large gondola.

Q. All right, is that what you are talking about them hauling stumps to Hercules?

A. Yes, sir.

Q. What was the color of the gondola cars that they were operating there that night?

A. Black.

Q. What color is the pavement out there?

A. Black.

Q. Where did you first see the sparks there?

A. Well, I would say about two car lengths from the crossing. The train was going on down, running like it normally went, and I looked out and saw all

of those sparks under the wheels and all, and I didn't know what it was, and I said, "I be-dog, if there isn't something dragging under that train."

Q. Did you hear any collision of any kind?

A. Yes, sir, I heard a collision just about two car lengths before I saw all of these sparks.

Q. All right, where were the sparks that you saw? I will ask you this first; did you see the sparks before you heard the collision, or after you heard the collision?

A. After I heard the collision.

Q. After you heard the collision?

A. Yes, sir.

Q. All right, on which side of the track, with regard to the Paradise Grill, were they on the side of the track toward you or were they on the other side of the track toward Brunswick?

A. Well, you couldn't tell. The whole thing under there was lit up where it was dragging on the rails and the wheels and causing all of that fire to fly.

Q. How far down the tracks did you notice the sparks?

A. Well, until it got out of sight around the bushes I noticed the sparks.

Q. All right, did you see anything else unusual as it was going down the track there?

A. Well, after it got on around the bushes down there I heard an explosion, and then the whole elements lit up, about 50 or 60 feet up in the elements all lit up.

Q. All right, in your best judgment, about how far —have you looked at that track since then?

A. Yes, sir.

Q. You were familiar with the track before that?

A. Yes, sir.

Q. About how far, to your best judgment, down the track was it when you heard the explosion and saw the sky light up?

A. Well, not measuring it, I would say a quarter of a mile down around the bushes, down close to a trestle around there.

Q. Where is the trestle located there?

A. About a quarter of a mile down from the crossing.

Q. All right, the trestle down there, is it exactly like the rest of the railroad trestles? Describe the trestle?

A. Well, it is where the dirt is cut out from under it and made kind of a water path under there. That is what I call a trestle.

Q. All right. Is there any different type of timber used in the trestle than is used on cross-ties?

A. Well, there is some difference, yes. They saw out timber to make a trestle.

Q. Now, after you saw, as you said the elements light up down there, what, if anything, happened then?

A. Well, the train come to a stop.

Q. Now, the train did not come to a stop until after you saw the sparks down here and until after the explosion finally happened?

A. That's right.

Q. All right, that was about a quarter of a mile after you first heard the collision?

A. Yes, sir.

Q. All right. Now, what, if anything happened after that?

A. Well, I would say that about five minutes after that, I made a remark that something had happened to that train, the brakes must be dragging, or some-

thing more than that happened when that explosion went off. So about five minutes later, Mr. Britt, the Conductor on the train, he came down to the place and asked me if I had a telephone, and I said yes, and he said he wanted to use it to call for some help.

Q. Did you know Mr. Britt?

A. Yes, sir.

Q. Did you know him before that?

A. Yes, sir.

Q. Now, he came in there and asked to use the telephone?

A. Yes, sir.

Q. Did you then go down to the accident?

A. Not right then, no, sir.

Q. What did you do then, Mr. Rozier?

A. Well, I just waited around the place there in front, taking care of the place, until he got through using the telephone. There was another man with him. I don't know who that was, and after they came out from calling into town to get some help they went on back down to the train and pretty quick after that I walked on down side of the train myself.

Q. All right, now you walked on down there. Mr. Rozier, what sort of a night was it with reference to weather conditions?

A. It was real foggy that night.

Q. Now, was there any fog around the crossing?

A. Yes, sir.

Q. What was the condition of the weather with reference to being cold or hot? How would you describe it?

A. Well, it wasn't either one. It wasn't hot nor it wasn't cold. It was just kinda cool like.

Q. Had you been there all that day?

A. Well, I lived there. I stayed there all the time except to run into town and back. I stayed there in the corner of the building right next to the crossing, my bed room was.

Q. How far back was your place from the crossing?

A. I would say a 150 feet, something like that.

Q. Did you have any trouble seeing the sparks there?

A. No, sir.

Q. And the explosion under the train?

A. No, sir.

Q. You had no trouble seeing it?

A. No, sir.

Q. On that pavement there, where that crossing crosses the road itself, does the rails stick up over the highway? How does it set on the black top surface?

A. Well, it wasn't smooth level. It was kinda unlevel there.

Q. I see.

Cross Examination.

By Mr. Pedrick:

Q. Mr. Rozier, in what way does that so-called model differ from the conditions that were there in October, 1951?

A. Well, it is just about like you can get it on a little place like that.

Q. All of the signs are on there that were on there then?

A. Yes, it looks like the signs that were there then.

Q. I hand you a photograph identified as D-1, do you recognize that?

A. Yes, sir. It seems like there was a cross arm sign up there.

Q. Well, do you recognize that as the scene?

A. Oh, that's the location.

Q. Is that the Pyles Marsh Crossing?

A. Yes, sir.

Q. Which direction is the highway going in that photograph?

A. It's going north.

Q. Toward Jesup?

A. Yes, sir.

Q. Do you see the Paradise Grill there?

A. Yes, sir.

Q. Where is that in the photograph?

A. That's way over to the right.

Q. On the right in that photograph?

A. Yes, sir.

Q. That white building there?

A. Yes, sir.

Q. And that's where you were on that night?

A. Yes, sir.

Q. How about the signs along the highway there denoting the highway crossing?

A. Yes, I see it.

Q. That is how it was there at that time too, isn't it? You recall the conditions there in 1951?

A. Yes, sir.

Q. Now, I show you another one, D-2, and ask you if that is not the same view, except a little nearer to the railroad crossing?

A. Yes, sir.

Q. Yes, that's the same.

Q. Just a little closer?

A. Yes, sir.

Q. Then I show you D-3, which is still closer to the crossing. Do you recognize that?

A. That don't look like it. It looks like it is too bright, too plain there.

Q. What do you mean? What's too plain?

A. This railroad crossing sign there.

Q. What's wrong with it?

A. It looks too bright or something.

Q. What about the other crossing signs along there? You didn't say they were too bright?

A. No, that wasn't too bright there. It looks more dimmer than this one right here.

Q. Well, that shows that the camera was closer to it there, don't it?

A. Well—

Q. —Do you say that crossing sign was not there in October, 1951?

A. No, I don't say it wasn't there. It just looks too bright.

Q. As a matter of fact, it was there, wasn't it, Mr. Rozier?

A. It just looks brighter than it was then. That's all.

Q. Well, you wouldn't say that was not a true representation of that sign there at that crossing in October, 1951, would you? I am talking about that cross buck sign now?

A. I want to say that one don't look like it.

Q. But you did say that it was there, did you not?

A. There was one there. I don't know whether that was it or not.

Q. It was one of the same design, was it not?

A. Yes, sir.

Q. It was right there, wasn't it?

A. Yes, sir.
Q. With the cross bars that way?
A. Yes, sir.

The Court:
They are just like they were but are brighter in the picture than you thought it was at that time?

The Witness:
Yes, sir.

Q. Now, Mr. Rozier, how long had that Paradise Grill been there at that time?
A. I would say six or seven months.
Q. Had you been there every since it had opened up?
A. Yes, sir.
Q. It had some neon lights around the edge of the roof, did it not?
A. Yes, sir.
Q. They always burned at night?
A. Yes, sir.
Q. Were they burning on the night that this accident happened?
A. Yes, sir.
Q. Were they pretty bright lights?
A. Well, no, not too bright. A red and green light wouldn't be too bright. They were just regular neon lights.
Q. They were like any other neon lights that a place like that had?
A. Yes, sir.
Q. What about the gasoline pumps, did they have lights on them?
A. Yes, they had little globes up there.

Q. They were burning that night?

A. Yes, sir.

Q. Now, referring back to these pictures, D-1-2 and 3, look along the edge of the highway there and see if that does not represent the trees generally and the undergrowth all along the right of way there in October, 1951?

A. Well, that represents right around there between the crossing and my place in there.

Q. What about the other places in approaching the crossing on the other side?

A. Well, right there at it, it doesn't show all those thick woods on the side there at all.

Q. The thick woods are off the right of way of the highway, isn't it?

A. Yes, sir.

Q. That shows the width of the highway, doesn't it?

A. Yes, the width of the highway.

Q. And the width of the right of way of the highway?

A. Yes, sir, and down in the ditch.

Q. That gives a broad view of the highway there, don't it?

A. Well—

Q. —it gives a broad view of the right of way that the highway goes over there, don't it, Mr. Rozier?

A. Yes, sir.

Q. And it represents what the conditions were at that time in October, 1951. Is that true?

A. Yes, that represents it right there around the crossing, yes.

Q. The particular areas that those pictures take, that is a true representation of it, isn't it?

A. Yes, sir.

Q. Mrs. Rozier also worked at the Paradise Grill at that time, did she not?

A. Yes, sir.

Q. Was she there that night of the accident?

A. Yes, sir.

Q. Who else was there?

A. A nephew of mine.

Q. Who was that?

A. Robert Moody.

Q. Robert Moody?

A. Yes, sir.

Q. What first attracted your attention about the train? Did you hear it coming?

A. Yes, sir.

Q. Did you hear it blow?

A. Yes, sir.

Q. Did you see the engine pass?

A. Yes, sir.

Q. Did you see the headlights burning?

A. Yes, sir.

Q. You didn't have any trouble seeing it?

A. No. It was straight out in front of me, where I was sitting at the counter, toward the crossing.

Q. And you could see the cars when they went by and see what kind of cars they were?

A. Well, you could see the bulk of them, some low and some high.

Q. You could see the outline of the cars in bulk which was a higher one and which was a lower one?

A. Yes, sir.

Q. They didn't have lights on them?

A. No, sir.

Q. And then you could see the space between them?

A. No. I couldn't see that.

Q. You couldn't see that?

A. No, you couldn't see that as it moved along.

Q. You could tell that there was a moving object passing, could you not?

A. Oh, yes.

Q. How far did you say you were from it?

A. I would say about a 150 feet.

Q. Now, you were in a place that was brillantly lighted, were you not? You were inside there?

A. Well, no, I walked out the door when all of this was happening.

Q. I understand, but I am talking about when you were looking at the engine. You said you were looking at it through a glass window?

A. Yes, and when it got even with me it came to the door like, and—

Q. —I am talking about you saw those cars?

A. Yes, I saw the light under the cars.

Q. But before you saw the light under the cars you saw the engine and the engine headlights?

A. Yes, sir.

Q. And then saw the bulk of the cars as they were passing?

A. Yes, sir.

Q. And could tell that there were moving objects passing?

A. Yes, sir.

Q. That was before any sparks?

A. Well, these sparks started right quick after that.

Q. Right after the engine passed?

A. No, right after the collision.

Q. I understand, but I am talking about the engine now. The engine passed you over the crossing. You saw that?

A. Yes, sir.

Q. Then there were several cars that passed before there were any sparks?

A. Yes, sir.

Q. And you could see those moving cars as they were going over the crossing?

A. Yes, sir.

Q. How many cars would you say passed over the crossing before you saw any sparks?

A. Well, I don't know exactly, but I would say ten or twelve cars.

Q. Ten or twelve cars?

A. Yes, sir.

Q. Do you know what caused those sparks?

A. I found out later, after I found out that there was something on the track, after it hit a car, or a car run under it or something.

Q. Now, you say you went out there?

A. I went to the door, yes, sir.

Q. But later you went out there?

A. Yes, later, I did.

Q. Well, did the car run under or hit the tenth or twelth car from the engine?

A. It run under it.

Q. Was it the tenth or twelth car?

A. I wouldn't say about that. I don't know just how many cars it was.

Q. Well, what is your best judgment? You saw them moving.

A. Well, I wouldn't dare to say. I didn't count them. I don't know how many cars passed.

Q. It was not right up at the engine?

A. No, sir.

Q. It was way back from the engine?

A. Yes, sir.

Q. Where the automobile hit the car?

A. Yes, sir. I didn't know what had happened until Mr. Britt came in and told me that he wanted to use the telephone and called for help.

Q. Now, where were you when you saw the sparks?

A. I was sitting at the counter.

Q. You were sitting at the counter?

A. Yes, sir.

Q. And just looking out the window?

A. The door.

Q. The door?

A. Yes, sir.

Q. The door was open?

A. Yes, sir, right even with me, two doors right even with the counter where I was sitting.

Q. Now, you say you heard some noise before you saw the sparks?

A. I heard a crash.

Q. You heard a crash?

A. Yes, sir.

Q. Now, before that had you seen any lights?

A. Nothing but the engine lights go by.

Q. You saw the engine lights go by?

A. Yes, sir.

Q. You didn't see any more lights then?

A. No, sir.

Q. You say you did not see a flare at anytime there?

A. No, sir.

Q. You didn't see any fusee burning?

A. No, sir.

Q. And the weather conditions and the fog and everything else was in a condition that you could have seen a fusee if there had been one burning?

A. Yes, sir.

Q. You could have seen it easily?

A. Yes, sir.

Q. From where you were?

A. Yes, sir.

Q. Were you looking for one?

A. Well, I was just looking out there at the crossing when the train came by the crossing and it went on and pretty quick my attention was called to the sparks under the train.

Q. Your real attention was attracted by the crash and the sparks?

A. Yes, sir, the crash.

Q. Before that you were not paying any particular attention to the train, were you?

A. Well, just sitting there looking out at the crossing as it come across, and then it went on around and the engine had done gone and the reckley I heard a crash, and when I did it was not but just a few seconds then before I saw all of these sparks under the train, so I went to the door and I said, "you know, there's something wrong with that train. The brakes must be dragging or something", and so it kept on going on down the track and more fire flying under the train, all lit up, and it got on down a little piece further and the reckley I heard an explosion, a gas tank busted on the car and it lit up the whole elements there for about 60 feet up in the air.

Q. You were still in the station?

A. No. I was out on the steps then.

Q. But you were still at the station?

A. Yes, sir.

Q. Let me get it straight, though, about your attention. You heard the train blow just as it customarily did?

A. Yes, sir.

Q. And that didn't specially charge your mind, did it?

A. No, sir.

Q. And when it passed, with the headlight burning, you saw that, but that was just an ordinary movement so far as your mind was concerned?

A. Yes, sir.

Q. And then you saw the cars as they were passing along, but there was nothing unusual, so you didn't charge your mind with that?

A. No, sir.

Q. Then the first thing that really attracted your attention was when you heard the crash?

A. Yes, sir.

Q. And you saw the sparks?

A. Yes, sir.

Q. Up to that time you had not been looking for any particular thing, had you?

A. No, sir.

Q. From where you were seated inside that building, in order for you to see the crossing itself, would you see it through the window or through the door?

A. Through the window there.

Q. Through the window?

A. Yes, sir.

Q. And then later you saw the cars passing?

A. Yes, sir.

Q. And then you saw through the door?

A. Yes, sir.

Q. In other words, when the engine passed the crossing you were looking through a window?

A. Yes, sir.

Q. And then you changed and looked through the door, is that it?

A. The window was right toward the crossing, a big plate glass window, and I was sitting right there looking out at that window when it happened, with my face to the counter, in front of the counter, and then these doors are right even with the counter, right here, like, and when the train left the crossing and went on up, and then I was looking right out the door at it, just like that.

Q. You turned and was looking out the door then?

A. Yes, sir, just turned and was looking out the door then.

Q. Now, the first man that came to you was Mr. Britt?

A. Yes, sir.

Q. What position did he have?

A. He was the Conductor.

Q. He was the Conductor?

A. Yes, sir.

Q. He came to you?

A. Yes, sir.

Q. You can't be mistaken about that?

A. No, sir.

Q. He was the man that came to use the telephone?

A. Yes, sir.

Q. How soon was that after the collision?

A. I would say about five minutes after the train came to a stop.

Q. You at that time had not gone down to the wreck?

A. No, sir.

Q. Now, you did later go down to the wreck?

A. Well, I didn't go all the way down. I went way down the track.

Q. Did you go far enough to tell that a railroad car had been derailed?

A. No, sir.

Q. You don't know that there was one derailed?

A. Well, they said one was derailed. I don't know.

Q. Did you see any evidence of it there at the crossing?

A. No, only after it passed I saw that the track was torn up. That was what I thought was dragging was the brakes, but there was a car off the track or something.

Q. I believe you said that the caboose went how far from the crossing before it came to a stop?

A. Well, I didn't say, and I wouldn't say how far but it was a good piece down the track before it come to a stop. I would say some three or four cars down below the crossing.

Q. Below the crossing before it came to a stop?

A. Yes, sir.

Q. That's your best judgment?

A. That's my best judgment.

Q. Did you know any other employee on that train?

A. No, sir, not personally.

Q. Did you know Mr. Glass?

A. You see, I have been knowing Mr. Britt for 30 years, or maybe 35 years, and I didn't know Glass, and I don't know him now, but they came in there, him and another man, and Mr. Britt said, "Hey, Bob." I said, "How do you do, Mr. Britt?" We spoke and talked some, and—

Q. Lets don't go into conversations?

A. I thought you wanted me to tell it just like it was.

Mr. Pedrick:

Well, are you insisting on that.

Mr. Mozingo:
Well, no unless—

The Court:
Well, I hold it is immaterial.

The Witness:
Anyhow, he just asked about using the telephone. He asked if I had a telephone, and I said yes, in my bed room, and he said, "Can I use it?"I said, "Yes, go on back and use it, and he did."

Q. How long did your place of business stay open after the wreck?
A. Well, until two o'clock.
Q. Now, you said that it was cool weather?
A. Yes, sir.
Q. And foggy?
A. Yes, sir.
Q. But you could see an object through the fog?
A. Yes, sir.
Q. You had no trouble, I believe you told Mr. Mozingo, that you had no trouble seeing the sparks?
A. No. That made it brighter out there then. It was real sparks out there.
Q. It lit up everything?
A. It looked like it set the train on fire, under the train there.

Re-Direct Examination.

By Mr. Mozingo:
Q. The pictures that counsel showed you with reference to the signs, the pictures that counsel for the other side showed you, describe the signs that were there at the time, the cross arm sign?

A. Well, it looked like the sign, but it looked like they were old faded out signs.

Q. And not the ones that were in the picture?

A. No, sir.

Q. All right, now one other thing he asked you; he asked you about the lights being on in your place. Would a person coming down the highway—you have driven down the highway when the lights were on in your place, haven't you?

A. Yes, sir.

Q. Would a person be able to see the lights in your place?

Mr. Pedrick:

Your Honor, that is a conclusion of the witness.

The Court:

He said he had driven down there when he could see them.

The Witness:

Well, not until you got right to the railroad crossing, you couldn't.

Q. Well, now, why couldn't you?

A. Because there was bushes and stuff back over here.

Q. Does your Grill set right up flushed with the highway?

A. No, sir, it sits back.

Q. And where are the lights on your place?

A. There is a rim outside with neon lights on it.

Q. All right, sir. Now, you said you were looking out the door. How many doors did you have on the front of your place at that time?

A. Lets see, I had—you mean all of them?

Q. I mean all of them?

A. I had—

Q. —starting down at this end now, how many doors did you have?

A. I had one door to my bed room outside, and than I had a door in the little room, the kitchen, and then right side of it was a door in the dining room, one in the dining room and one in the kitchen, and then there was two doors down at the toilet down there.

Q. How many windows did you have to the place?

A. I had two little windows between the toilet doors and the dining room door, up high, and then I had that plate glass window, and then a little serving window.

Re-Cross Examination.

By Mr. Pedrick:

Q. I hand you again, Mr. Rozier, this photograph D-1. Now a motorist on the highway at the furtherest point from the crossing there could still see your place of business, could he not?

A. He would have to get right there at it.

Q. Right at it. He would have to get right at the crossing. Is that what you are talking about?

A. Well—

Q. —is that what you call "right at it"?

A. Well, I would say that is 75 or 80 foot of the crossing, isn't it. I can't tell.

Q. Now, D-2 is closer than D-1, isn't it, closer to the crossing a car on the highway would be?

A. Yes, sir.

Q. On either one of them they could see your place and the neon lights there?

A. Yes, sir.

Q. From where you were sitting at the counter there, that you are testifying about there, could you see out of both the kitchen door and the dining room door?

A. Well, certain parts there you could see through the dining room door, but I was right even with the dining room door. I was looking mostly out of the dining room door.

Q. That view was beyond the crossing?

A. Yes, sir.

Q. You couldn't see the crossing there?

A. Not through it, but I looked through the plate glass, the big plate glass window.

Q. That was the only place that you could see the crossing, was through the window?

A. Through the big plate glass window?

Mr. Pedrick:
That's all.

Mr. Mozingo:
No further questions.

The Court:
All right, you may go down.

(Witness excused.)

ROBERT MOODY, Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Mozingo:

Q. What's your name?

A. Robert Moody.

Q. Robert, where were you born?

A. Eulonia, Georgia, about twelve miles the other side of Darien.

Q. Where do you live now?

A. I live in Brunswick.

Q. You live in Brunswick, Georgia?

A. Yes, sir.

Q. Do you go to school?

A. Yes, sir.

Q. Where do you go to school at?

A. I go to school here, at Glynn Academy.

Q. Glynn Academy?

A. Yes, sir.

Q. How long have you gone to school here?

A. Off and on all of my life.

Q. You have lived around here a good many years?

A. Yes, sir.

Q. Robert, do you know Mr. Rozier, who testified in this case?

A. Yes, sir. He is my uncle.

Q. He is your Uncle?

A. Yes, sir.

Q. Do you know where Mr. Rozier's place of business was in October of 1951?

A. Yes, sir.

Q. How old are you now, Robert?

A. Almost seventeen.

Q. Almost seventeen?
A. Yes, sir.
Q. And what class are you in at high school?
A. In Junior high school.
Q. Junior High School?
A. Yes, sir.
Q. What class were you in in 1951, if you recall?
A. I was in the 7th grade.
Q. The 7th grade. Now, Robert, do you know where your uncle's place of business was in 1951?
A. Yes, sir.
Q. Do you live with your parents?
A. No, sir. I live with my aunt.
Q. All right. Now, Robert, on October, 1951, were was your uncle's place of business located?
A. It was out at Pyles Marsh.
Q. Do you know where Pyles Marsh Crossing is?
A. Yes, sir.
Q. Do you know where it was in 1951?
A. Yes, sir.
Q. Did you ever go out there to see your uncle?
A. Yes, sir, I did, very often.
Q. What was the occasion of you going out there to see him? How did you happen to go out there?
A. Well, my aunt was working out there at the time.
Q. I see.
A. And a lot of times, instead of staying at the house by myself, I went out there and played around.
Q. In the home where you were living at that time was you and your aunt?
A. Yes, sir.
Q. You all were the only people living in the home?
A. Yes, sir.

Q. She worked there at the grill?

A. Yes, sir.

Q. Do you know what highway that place is on, that is, where it leads from and where it leads to?

A. Yes, sir, it is between here and Jesup.

Q. Between here and Jesup? Have you ever driven along there at that time with your aunt?

A. Yes, sir.

Q. Did she have an automobile?

A. Yes, sir.

Q. As you approached, going out that direction, and as you approached the Pyles Marsh Crossing, what, if anything, was there on the right-hand side to obstruct the view of an on-coming train?

A. Well, there were trees and a very dense undergrowth.

Q. How far toward the crossing did that continue? How close to the crossing did it come to?

A. Well, there was a little point there that came right up to the crossing. There was grass, you know, tall grass right in there.

Q. I see. The underbrush there, could a person see through if the lights of a train were coming?

A. No, sir.

Q. Was it dense growth?

A. Yes, sir.

Q. Robert, does the track there, in crossing the highway, how does it cross the highway?

A. It makes almost a perfect "X".

Q. Almost a perfect "X". Have you played around in that territory out there when you were a boy?

A. Yes, sir.

Q. Come down here and show the jury where those places are. What is this here?

A. That's an old road that comes back into the new road here, it's an old road up there.

Q. Where is the paradise grill?
A. Right here.
Q. Is that the place your uncle ran?
A. Yes, sir.
Q. All right, what is this over here, Robert?
A. A colored church.
Q. A colored church?
A. Yes, sir.
Q. Was that there in 1951?
A. Yes, sir.
Q. All right, where was the dense under-brush you were talking about approaching the track?
A. Right along in here.
Q. All right, that's in going from Brunswick toward Jseup, on the right-hand side, approaching the crossing?
A. Yes, sir.
Q. How far, in approaching the crossing there, would one have to be before he could see down the crossing, looking toward the right?
A. He would have to be right on it.
Q. Was there anything in here, in this point, that would obstruct the view of a motorist going toward that crossing, a fellow driving an automobile?
A. Well, there was some tall grass there.
Q. All right. And your testimony is that he would have to be right on it before he could see down the track?
A. Yes, sir, in coming down the railroad it comes out almost like a small canyon, like from a cut down there.
Q. In other words, the railroad, in going back this way towards Brunswick, sits in a cut?
A. Yes, sir.
Q. How deep is the cut, if you know? Just tell the jury. Have you been down there?

A. Yes, sir.

Q. Why did you happen to be going down in there?

A. Well, a lot of times I would walk up and down the railroad in the afternoon while I was out there, and standing on the railroad you couldn't see the road from the cut. It was high enough you couldn't see the road standing on the track.

Q. So there was a cut that further obscured or blocked out a train coming up toward the crossing until the train got right at the crossing?

A. That's right.

Q. All right. Now, Robert, have you been down on this end of the track, toward the Waycross end of the track?

A. Yes, sir.

Q. Do you know where the trestle is down there?

A. Yes, sir.

Q. About how far is it from the crossing, if you know?

A. I don't know just how far it is, but it is on down here.

Q. What is the trestle there for?

A. Well, there is water there.

Q. All right, where were you on the night of October 24th, or the early morning, say, 12:35, the early morning of October 25th, 1951?

A. I was in the grill there, in the bed room.

Q. In the bed room. All right, show the lady and gentlemen where the bed room is?

A. Right here, in this corner, right here.

Q. All right, Robert, what were you doing there in the bed room?

A. Well, you mean why I was in the bed room at the time?

Q. Well, what were you doing at that time?

A. Well, I think at that time I was building a model airplane. I was in there working on that.

Q. I see. All right, at the time you were in there working on the model airplane, did you hear an approaching train?

A. Yes, sir.

Q. Did you see a train that night?

A. Well, I heard it. I didn't look out the window at it.

Q. You kept on with what you were doing?

A. Yes, sir.

Q. What unusual noise did you hear that attracted your attention there about that time of night on October 24th, or October 25th, 1951?

A. Well, as the train came on the crossing there we heard an explosion or crash, or something.

Q. You heard a crash?

A. Yes, sir.

Q. All right, did you look out the window?

A. Yes, sir.

Q. What did you see, Robert?

A. Well, I saw some sparks flying from under the train, and when it was going on down the track, after the train passed, we saw an explosion.

Q. Now, where was the train about the first time you saw the sparks?

A. Well, the sparks—

Q. —where were the sparks?

A. Afer it got off the crossing, right in here.

Q. Then where did you see the explosion? Did you see the explosion?

A. Well, I didn't exactly see it, but I saw the lights above the trees.

Q. Now, was all of that while you were looking out this window at this end of the building?

A. No, sir, I came to this plate glass window and looked out.

Q. All right, the first thing you heard was a crash?

A. Yes, sir.

Q. All right, what did you do then after you heard the crash?

A. I came to the window and looked out.

Q. Then where did you see the light of the explosion? Where were you standing at that time?

A. Well, I was standing here right behind this plate glass window.

Q. All right, then did you go outside and continue to look out?

A. Well, I continued to look out the window and then I saw the explosion.

Q. All right, Now, Robert, did you see any lights from any fusee on the crossing, after you heard the crash and explosion? The first thing you heard was the crash and then the explosion?

A. Yes, sir.

Q. Did you see any light from any fusee there?

A. No, sir, I don't remember seeing any.

Q. Do you know what a fusee is?

A. Yes, sir.

Q. Have you ever seen ore burning?

A. Yes, sir.

Q. You have played around that crossing out there, I guess, have you not?

A. Yes, sir.

Q. All right, you are sure now that after you heard the crash out there and after you saw the explosion you saw no lights from any fusee on the crossing?

A. No, sir.

Q. Did you see any warning lights of any kind out there around the crossing?

A. No, sir.

Q. You didn't see any warning lights of any kind?

A. No, sir.

Q. All right, now what is the next thing that you recall in connection with the accident?

A. Well, after the explosion occurred and not too long after that two men came into the place and wanted to use the 'phone.

Q. Now, who were those men? How were they dressed?

A. In overalls.

Q. All right. They wanted to use the 'phone?

A. Yes, sir.

Q. Who did they call? Don't tell what they said. But who did they call?

A. I think they called the County Police.

Q. Who did they represent themselves to be?

A. Railroad men.

Q. And they were dressed in overalls?

A. Yes, sir.

Q. Railroad overalls?

A. Yes, sir.

Q. All right. You said you were building a model airplane?

A. Yes, sir.

Q. Then would you say this was a pretty good model?

A. Yes, sir.

Q. All right, sir. You can go back up there on the witness stand. If there had been a fusee there, were you in condition where you could have seen it?

A. Yes, sir.

Q. And you say there was none burning?

A. No, sir, I didn't see any burning.

Q. Robert, what was the weather conditions there that night? Was it a cold night, or a warm night?

What was the type of weather conditions?

A. Well, the main thing I remember it was a foggy night.

Q. All right, let me ask you this; this was at 12:30 at night. How long had the fog been there, if you know?

A. Not very long, not too long.

Q. All right. Robert, after the two men made the telephone call, how long did you stay out there that night? Did you spend the night?

A. No, sir, I didn't.

Q. I see. After the men came in, how long was it before you left?

A. Well, I don't remember exactly how long it was, but it wasn't very long.

Q. Did you go to where the dead boys were?

A. No, sir.

Q. I see. You stayed in the place of business?

A. Yes, sir.

Q. Now, did your aunt come back for you?

A. Yes, sir.

Q. When she came and got you, where did you all go ?

A. We came back to Brunswick.

Q. Who drove the car back to Brunswick?

A. She did.

Q. Did you notice the condition of the fog out in the area of the crossing there that night? Do you know how much fog there was that night at the crossing? Maybe I am talking in too much legal terms for your age, but did you notice how much fog there was there that night at the crossing?

A. Well, it was more or less in patches.

Q. Now, Robert, tell me what you mean by patches of fog?

A. Well, you would be driving along in a car and you were in it before you knew it.

Q. Now, going back to town, it wasn't a continuous fog all the way to town?

A. No, sir.

Q. All right, was there a fog there at the crossing at the time you heard the crash and immediately during that time?

A. Well, I wasn't looking out the window before the crash, but if I remember correctly afterwards, it was, when I went home.

Q. As you went on home it was not a continuous fog but were patches of fog, I believe you said?

A. Yes, sir.

Q. Kinda in streaks?

A. Yes, sir, kinda in blankets, you might say.

Q. Pyles Marsh area, does water stand around out there?

A. It is a low area out there. I guess that is why they call it Pyles Marsh.

Q. Robert, had you been outside anytime before that night?

A. Yes, sir.

Q. In other words, were you helping your uncle around the place there?

A. Well, I didn't to much inside, but I waited on the guests sometimes.

Q. You had been outside that night?

A. Yes, sir.

Q. Had you been outside the early part of the night before this?

A. Yes, sir, at different times.

Q. When you were outside earlier that night, did you see any fog earlier that night?

A. Right after dark you might say there wasn't any. I had not been there very long. I had not been out very much.

Cross Examination.

By Mr. Pedrick:

Q The fog got thicker after the wreck?

A. Well, I wasn't out there very long after the wreck.

Q. You went on to Brunswick?

A. Yes, sir.

Q. It was getting thicker all the time, was it not?

A. It wasn't as thick the closer we got to Brunswick as it was out there.

Q. Do you see this picture that has been identified as "P-1"? Do you recognize that?

A. Yes, sir, it is a picture of the crossing there.

Q. And, which way is the highway going, as shown in that picture?

A. Going toward Jesup.

Q. North?

A. Yes, sir.

Q. Toward the crossing?

A. Yes, sir.

Q. And that picture is a fair representation, is it not, of the crossing as it was in October, 1951?

A. I was just trying to remember here. I don't remember distinctly that there is a sign here. I don't remember distinctly if this was here or not.

Q. What sign do you refer to, Robert?

A. The "X" sign up here, with the "Stop" sign on it. I remember the basketball sign, you might say.

Q. What do you call the basket-ball sign?

A. The square one.

Q. The square board. This basket ball sign is the first sign that you can see in this picture "D-2"?

A. Yes, sir. That is the type sign, I mean.

Q. Is that the only one that you recall?

A. Yes, sir, it is.

Q. Now, refer to this D-3 photograph. Are you in position to say, Robert, that that sign was not there in October, 1951?

A. I don't remember it being there.

Q. Well, I mean are you familiar enough with the crossing to say that it wasn't there?

A. Well, I went out there a lot, and I don't remember it being there at the time.

Q. That is as far as you can say? You just don't remember?

A. Well, I don't remember the sign being there.

Q. Now, refer to all three of those pictures, Robert, with reference to the terrain, the highway right-of-way as it approaches the crossing. I will ask you if those pictures are not a fair representation of the condition at that time in October, 1951, when this accident occurred?

A. This glass along here, this point here, is what I was referring to awhile ago.

Q. It is shown in that picture like you were talking about here, was it not?

A. Yes, sir, the grass.

Q. And in approaching the crossing from Brunswick, going toward Jesup, that picture D-1, D-2 and D-3 gives a view that a motorist has toward the crossing?

A. Up close, yes, sir.

Q. Regardless of that, but at the point as shown in the picture?

A. Yes, sir, from where the sign was at that time he would see this.

Q. Now, when you say "right up on it", you still qualify that with the distances shown in those pictures?

A. Well, this one here was not taken far from the crossing.

Q. Each one is a little closer to the crossing, is it not?

A. Well—

Q. —each one is a little closer to the crossing, isn't it, Robert?

Mr. Mozingo:

If Your Honor please, let him finish the question.

Q. Do you want to add anything to it before I ask the other question, Robert?

A. You ask the question again.

Q. I asked you if those three pictures show different distances from the crossing, do they not?

A. Yes, sir.

Q. Which one would be the furtherest away from the crossing? Which picture there would be the furtherest away from the crossing?

A. This one right here.

Q. Look on the back and say which one that is?

A. That's D-1.

Q. All right, the next one the closest to the crossing?

A. D-2.

Q. Now, the other one, D-3. That is the one you say is right on the crossing, isn't it?

A. Almost, yes, sir.

Q. That is what you were referring to when you said you couldn't see until you were right on the crossing?

A. No, sir, not exactly right there. The question he asked me was what I could see back down the track.

Q. Oh, you are talking about being able to see a train coming to the crossing?

A. Yes, sir.

Q. You were not referring to seeing an object on the crossing, were you?

A. If it was on the crossing right directly in front of you.

Q. Why, you could see?

A. Yes, sir.

Q. The undergrowth didn't have anything to do with that?

A. Not on the road, not if it was directly in front of you, no, sir.

Q. Now, you said you had ridden out there at that time. We are trying to tie it all back in October, 1951.

A. Yes, sir.

Q. You had ridden out there with your aunt a good many times?

A. Yes, sir.

Q. What was your aunt's name?

A. Mrs. Rozier.

Q. Was it this Mr. Rozier that testified here this morning?

A. Yes, sir, his Ex-wife. They are divorced now.

Q. I see. I was trying to understand that part. You had ridden out in that section several times before this?

A. Yes, sir.

Q. Had you ever ridden out to a place called the flowing well? Do you know where there is a flowing well out beyond this crossing toward Jesup?

A. Well—

Q. —along the highway?

A. You mean past the crossing?

Q. Yes?

A. I don't—

Q. —toward Jesup?

A. I don't distinctly remember exactly where one was.

Q. You have never ridden out there?

A. Yes, sir, but I don't remember a flowing well being there.

Q. Well, what do you remember? You mean you have ridden beyond the crossing?

A. Yes, sir.

Q. But not to a flowing well?

A. No, sir.

Q. Now, Robert, can you identify in those pictures the room in the Paradise Grill that you were occuping?

A. Yes, sir.

Q. Could you point it out to the jury there?

A. Yes, sir.

Q. Which one would give the clearest view?

A. I think you could possibly see it from this one. I was right in the corner there.

Q. The window at the extreme right as shown in the picture there?

A. No, sir. Facing this way, it would be right at the corner there.

Q. Next to the edge of the picture?

A. Here where those windows are.

Q. What picture is that?

Mr. Mozingo:

If Your Honor please, we object to him exhibiting those pictures to the jury because we contend that

they were taken after that time and the conditions were changed.

The Court:
He said it was the day of the accident.

Mr. Pedrick:
Yes, Your Honor, and in addition to that he identified the picture.

The Court:
Well, they have not been introduced in evidence yet, but for the time being I will admit them, but if he does not identify the pictures as being taken the day of the accident, or the day afterwards. then you make your motion at that time.

Mr. Mozingo:
Is he offering them in evidence before he exhibits them to the jury? He can't exhibit them to the jury until they are offered in evidence.

The Court:
That's right.

Mr. Pedrick:
Well, I am just asking him to identify them here, Your Honor. I think I can do that.

The Court:
I know, but you can't exhibit them to the jury until after they are identified.

Mr. Pedrick:
I haven't put them in evidence yet.

The Court:

I know you haven't, but you can ask him to identify them, if he can, and then you can introduce them later on, if you want too.

Q. Now, Robert, that is picture D-3?

A. Yes, sir.

Q. You were at the window at what side as shown on that picture?

A. I wasn't at the window?

Q. You were in the room?

A. Yes, sir.

Q. Where that window was?

A. Yes, sir.

Q. The window on the extreme right-hand edge as you look at that picture?

A. Yes, sir.

Q. Now, you were engaged in making a model air plane, I believe you said?

A. I was, yes, sir.

Q. Your first recollection is you heard the train coming?

A. Yes, sir.

Q. What kind of noise? Did you hear it blow?

A. I guess it blew. I don't remember distinctly.

Q. You were conscious of it coming?

A. Yes, sir.

Q. At the time the engine passed, you didn't look out the window, I believe you said?

A. No, sir.

Q. Could you see the crossing from where you were?

A. Not from where I was working there, no, sir.

Q. Not from that room?

A. Well, if you looked out the winodw you could from the room.

Q. Out that same window you identified there?

A. Yes, sir, if you look out the window.

Q. You didn't actully see the train until you heard the crash? Is that your testimony?

A. Yes, sir.

Q. When you heard a crash, which way did you look?

A. Well, I immediately went to this plate glass window in the front there, because I was close to the door, which leads out the front, and of course I went there, because I could possibly have a better view there of what had happened.

Q. Did you leave one room and go to the other?

A. Yes, sir. I went more to the middle of the building to look out.

Q. Can you see the window on that picture that you went to the second time that you actually looked out?

A. You can see part of it, yes, sir.

Q. Can you say which window it is on that picture 3-D?

A. Well, it is a plate glass window.

Q. Is it closer to the highway, or further away from the highway than the first window you are talking about?

A. It is further away from the highway.

Q. It is further away?

A. Yes, sir.

Q. Now, you looked out and saw what?

A. Well, I saw the sparks flying from under the train.

Q. Do you know what part of a train that was?

A. Sir?

Q. Do you know what part of the train that was?

A. What do you mean?

Q. I mean the front of the train, or close to the rear, or how far from the end of the train?

A. Well, I don't know exactly where that was, but the train had been passing for a little while before we heard the crash.

Q. So then it was not near the front of the train?

A. I wouldn't think it would be, no, sir.

Q. Now, were there still some cars going over the crossing when you got to the window?

A. I don't distinctly remember seeing any, no, sir.

Q. What was it you saw then, lights?

A. When I looked out the window?

Q. Yes?

A. The first thing I saw was the sparks flying, and I heard the screeching noise.

Q. And, could you see any cars?

A. No, sir, not as I remember.

Q. You just don't recall?

A. I don't remember seeing any cars.

Q. But you had no trouble seeing the sparks?

A. No, sir. I could see the sparks.

Q. The fog didn't keep you from seeing those?

A. No, sir. I could see the sparks flying.

Q. Now, Robert, that place that your uncle ran there, the Paradise Grill, it had neon lights on it, did it not?

A. Yes, sir.

Q. They were burning that night?

A. Yes, sir.

Q. And there were lights at the gas tank there out in front?

A. Yes, sir.

Q. Did they have lights on them?

A. On the bulbs, you might say, on the top there. It had the name written on it, you know, the kind of gas it is.

Q. Were they burning at the time of this accident?
A. I don't remember if they were not, but I presume they were.
Q. But the neon lights, you do recall, were on?
A. Yes, sir.
Q. Then there were lights on inside the house?
A. Yes, sir.
Q. And they were visible through the plate glass window next to the track?
A. Well, the glass window was facing the road.
Q. Facing the highway?
A. Yes, sir. You see, the highway went along in front of the building, and the plate glass window there, I could look right out to the road.
Q. Now, as to these photographs, D-1 and D-2, a party driving northward on the highway would have, as far as the picture themselves, I mean they would be facing the Paradise Grill, would they not, in a general direction? You see there?
A. Well, you would be facing the end of it, you might say.
Q. Well, a part of the building would be directly in front, would it not?
A. Well, you could see the building going down—actually the face of it was facing the highway.
Q. Well, the end of it, next to the railroad, would be the part you would see on the highway going northward?
A. Yes, sir.
Q. Now, going back to town, Robert, after this accident, I believe you said your aunt drove the car?
A. Yes, sir.
Q. How fast did she drive?
A. I don't remember distinctly how fast she drove.
Q. Did she drive just as she ordinarily did?

A. Yes, sir, I guess so.

Q. You don't remember?

A. I don't remember that she drove exceedingly fast, but I don't think she crept along either.

Q. The fog was not so bad she had to creep along, did she? That's what I am driving at?

A. No, sir.

Q. She could go along?

A. Yes, sir. As I said, the fog was in patches kinda. She didn't go slow all the time.

Q. And those patches would go like waves. They would not stay in one place all the time?

A. That's right.

Q. Kinda blow along?

A. Yes, sir.

Q. The fog itself would lift in one place and land in another, would it not?

A. Yes, sir.

Q. That type fog?

A. I guess so.

Re-Direct Examination.

By Mr. Mozingo:

Q. Robert, the Paradise Grill is about how many feet beyond the crossing where the accident happened? Do you know?

A. Well, I don't know exactly.

Q. Let me ask you this question: Going north toward Jesup the Paradise Grill sits beyond the place where the accident happened, doesn't it?

A. Yes, sir.

Q. Now, he asked you what would keep you from seeing the cars on the crossing there that night. I didn't understand your answer. He asked you about

the photographs. What color were those stump cars there?

A. They were black.

Q. What color is the highway?

A. It's black.

Q. And there were no fusees there?

A. No, sir, I didn't see any.

Q. No sign of any kipd of lights?

A. I didn't see any.

Q. You saw no lights as far as you could see in either direction while that train was passing? I mean there were no lights at the crossing?

A. No, sir.

Q. Robert, you said you were about 12 years old. What were you doing out there that night?

The Court:

I think he testified to that. He said he was out there because his aunt was out there. Is that what you said?

The Witness:

Well, right then my aunt wasn't out there. She was taking Red Cross lessons.

Q. She was working there, but that particular night she was where?

A. She was taking some Red Cross lessons, and she had stopped to see some friends, I think. I don't know exactly, was why she hadn't come for me.

Q. Robert, did your aunt raise you?

A. Yes, sir.

Q. Where is your mother?

A. She's dead.

Q. Your mother is dead?
A. Yes, sir.

Re-Cross Examination.

By Mr. Pedrick:

Q. Robert, you said the cars were black. Do you know whether all the cars in that train were black?
A. No, sir, I don't know if all of them were or not.
Q. Do you know whether or not the lights of the automobile in which the boys driving had lights, whether the lights were burning or not?
A. You mean on the automobile?
Q. Yes?
A. When they were coming upon the train?
Q. Yes?
A. I didn't see them approach the train.
Q. You don't mean to say the lights wouldn't show up cars on the crossing, do you?
A. I don't know.

Mr. Pedrick:
That's all.

Mr. Mozingo:
You can go back to school. Do you want to go back to school?

The Witness:
Not specially.

The Court:
Well, he can go.

(Witness excused.)

JIMMIE A. MILLER, Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Mozingo:

Q. You are Mr. Jimmie Miller?

A. Yes, sir.

Q. Mr. Miller, where do you live?

A. In Brunswick.

Q. You are in what business, sir?

A. Funeral business.

Q. What is the name of your home?

A. Edo Miller & Sons.

Q. Mr. Miller, how long have you lived here in Brunswick?

A. All of my life.

Q. Are you familiar with the roads and highways around Brunswick?

A. Yes, sir.

Q. Do you know where the Pyles Marsh Crossing is?

A. Yes, sir.

Q. Did you have an occasion on October 25, 1951, to answer a call to go to Pyles Marsh Crossing?

A. Yes, sir.

Q. What was the circumstances of the call? What was the purpose in going there?

A. Well, an automobile had hit the train on the crossing out there.

Q. And they called you?

A. Yes, sir.

Q. And did you go out there?

A. Yes, sir.

Q. Now, when you got there to the crossing, where did you park your—did you go in an ambulance?

A. Yes, sir.

Q. Do you recall where you parked your ambulance?

A. I parked it on the side of the road there.

Q. Did you leave it up near the crossing?

A. Yes, sir.

Q. Where did you then go, personally?

A. Well, they had told me what had happened and the train—that this car had hit the train and was down the track and we started down the track.

Q. All right, sir. You went on down the track?

A. Yes, sir.

Q. Did you find the body of one of the boys there?

A. Yes, sir.

Q. As you went down the track—do you know where there is a trestle down there?

A. Yes, sir. There is a little trestle or bridge of some kind, down the track there.

Q. With reference to the highway near the crossing, and the trestle being here, the body of the boy you found, was it on—say this is east and this is west, was it on the west side of the track—I mean was it on the west side of the trestle?

A. Well, it was on the left going down the track.

Q. I see. Do you know who the body of that boy was?

A. Well, I found out later that it was the Holmes boy.

Q. Leonard Holmes?

A. Yes, sir.

Q. All right, now did you go on further down the track?

A. I went on down the train, yes, sir

Q. Did you see the car there caught up under the train?

A. Yes, sir.

Q. Did you see any other bodies there in the car?

A. In the car?

Q. Yes, sir?

A. Two bodies in the car, yes, sir.

Q. I see. At the time you saw them—did you later learn who they were?

A. Yes, sir.

Q. The names of them?

A. Yes, sir.

Q. Do you recall what their names were?

A. Yes, sir. One of them was named Beckham, and one Tyre.

Q. Which one was under the steering wheel?

A. Well, the way the car was sitting, they were pinned in the car and the fellow, Beckham, was under the steering wheel.

Q. Do you recall whether the tires on the car were still inflated?

A. I don't remember.

Q. You don't remember any details about that?

A. No, sir.

Q. Was any fire there?

A. It wasn't exactly a fire, but there was enough there to pour some water on. It was smoking and we poured water on that to put that out.

Q. Did you notice any evidence of any fire there on the track or anything?

A. I couldn't tell you about that.

Q. I hand you a photograph and ask you if that is a picture of the boy, the way you saw the driver there that night?

A. Yes, sir, this is the one under the wheel. I mean they both were pinned in. Beckham was on the side—

Q. Was that a picture of the Beckham boy?

A. Yes, sir, that was the side the wheel was on.

Mr. Mozingo:

I would like to offer this in evidence, if Your Honor please.

The Court:

Any objections?

Mr. Pedrick:

Yes, sir. We object to it on the grounds that it is inflammatory and is wholly irrelevant. It is blown up and we object to it on that ground. It is not a normal photograph like other photographs. It is blown up purely for the purpose of appealing to the sympathies of the jury.

The Court:

Well, I don't know. The only question before me is whether it is legally admissible. What do you say?

Mr. Mozingo:

We don't want any sympathy. We just want what we are entitled to and we are sure we will get it. Now, the picture being blown up, of course, makes no difference about that. As we understand the Georgia law it makes a difference as to who was driving the car, as a matter of law. If he is prepared to admit that this Beckham boy was driving the car then we don't care about it. We don't care about it being put in, if he is prepared to admit that.

The Court:
What do you say to that, Mr. Pedrick?

Mr. Pedrick:
I am perfectly willing to admit that, Your Honor, if you won't put in that picture.

The Court:
All right.

Mr. Mozingo:
All right, then we will withdraw this from the presence of the jury.

The Court:
All right, he said he would admit it.

Q. Mr. Miller, I hand you a photograph there and ask you if you recognize that photograph?
A. Yes, sir.
Q. That's the car?
A. Yes, sir, a portion of the car.
Q. You recognize it?
A. Yes, sir.

Mr. Mozingo:
This is one that is not blown up, Your Honor

The Court:
What is the purpose of that one?

Mr. Mozingo:
We want to show that the tire was not busted and we want to use it in argument, Your Honor.

Mr. Pedrick:
Is that the automobile?

Mr. Mozingo:
Yes, sir.

Mr. Pedrick:
No objection.

The Court:
Admitted without objection.

Mr. Mozingo:
We will mark this one D-1.

Q. After you got down to where the two boys were in the cr, what did you then do, Mr. Miller?

A. Well, we found that we couldn't get them out of the car because they were pinned in and the only way that—of course, there were other people around and the only way we figured we could get them out was to get a torch and burn some of the metal away, so that we could get the seat out from under them and slip them out.

Q. I see. Was that done?

A. Yes, sir.

Q. The two boys in the car, Beckham and Tyre, were taken out of the car and Leonard Holmes was picked up down the track?

A. Yes, sir.

Q. They were all dead, of course, at that time?

A. Yes, sir.

Q. You didn't pay any attention to the weather conditions in going out there that night, or did you?

A. No, sir, not particular.

Cross Examination.

By Mr. Pedrick:

Q. Mr. Miller, you didn't pay any attention to the weather conditions?

A. No, sir.

Q. Did you drive from Brunswick to the wreck?

A. Yes, sir.

Q. That would be northward toward Jesup?

A. Yes, sir.

Q. You didn't have to slow down on account of the heavy fog?

A. I couldn't remember about that because it has been so long ago. I go out so many times like that, I couldn't exactly remember.

Q. You don't recall in having any difficulty in driving out there?

A. No, sir, I couldn't say that I did.

The Court:

All right, you can go down. Call your next witness.

Mr. Mozingo:

We would like to introduce the testimony of Mrs. Jimmie Doran, taken on behalf of the Plaintiff in Valdosta.

The Court:

Any objections?

Mr. Pedrick:

No, sir.

The Court:

All right, you may read it.

Mr. Mozingo:

Gentlemen, this is the testimony of Mrs. Jimmie Doran, taken in Valdosta, Georgia, on March 8, 1956, pursuant to notice.

It was agreed between counsel that the testimony of Mrs. Doran may be used in all three of the above-stated cases.

It was further agreed between counsel that objections, if any, may be made at the time of the trial of the cases. Mr. E. Way Highsmith, appeared as attorney for the plaintiffs, and Mr. John W. Bennett for the defendant.

Whereupon, the witness, MRS. JIMMIE DORAN, by the way of deposition, testified for the plaintiffs as follows:

Direct Examinttion.

By Mr. Highsmith:

Q. Your name is Mrs. Jimmie Doran?

A. Yes, sir.

Q. But you were before you married, Edgar?

A. Yes, sir.

Q. And you live now in Valdosta?

A. Yes, sir.

Q. And you have a three-weeks-old—when was your baby born?

A. It will be a month old this coming Tuesday.

Q. And you can't leave him very well to go to Court?

A. No, sir.

Q. In October, 1951, where did you live?

A. Brunswick, Georgia.

Q. When were you born?

A. September 18, 1933.

Q. In October, 1951, you were in high school, weren't you?

A. Yes, sir.

Q. Glynn Academy?

A. That's right.

Q. Do you remember the night of October 24, or it was the morning of October 25, 1951, when the three boys were killed out at Pyles Crossing?

A. Yes, sir.

Q. In Glynn County. Mary Ruth, did you have a date with Leroy Beckham that night?

A. Yes, sir.

Q. That is the night of October 24. Do you remember the day of the week it was—it was Bett's birthday—you wouldn't remember? Anyway, it was the night of October 24? You all had a birthday party for Betty Farrell, didn't you?

A. Yes, sir.

Q. At Mrs.—

A. —Mrs. Eberhardt's home.

Q. You and Leroy, and Betty Farrell had a date with Perman Tyre?

A. Yes, sir.

Q. Now, then, what did you do when you left the party at Mrs. Eberhardt's?

A. We went to the movies at the Ritz Theater.

Q. Do you remember what time?

A. We were there at nine o'clock, I am sure, almost positive.

Q. Was there any special picture on that made you remember?

A. Yes, sir, Valentino. I am almost positive we were there at the beginning.

Q. Do you remember when you left?

A. Right after the movie.

Q. How long, do you remember?

A. Two hours, I would say.

Q. You left about eleven o'clock?

A. Yes, I would say.

Q. You and Leroy were together, and Betty and Perman? You were in a car—automobile?

A. Yes, sir.

Q. Whose car was it?

A. Leroy's family's car.

Q. Did you drive any that evening?

A. Yes, sir, I did.

Q. How were the brakes?

A. Good, I would say.

Q. How about the lights?

A. Everything was all right, so far as I knew.

Q. You didn't notice anything wrong about the car?

A. No, sir, I don't think they would have let me drive.

Q. You hadn't apparently been driving very long?

A. I had just gotten my driver's license that day.

Q. You had just gotten your driver's license that day?

A. That very day.

Q. Had you had some other kind—beginner's license?

A. I didn't have one.

Q. You were just learning to drive?

A. Yes, sir.

Q. You left the movie in the same car? How were you seated in the car at that time—do you remember?

A. I think Leroy and I were in the back—I don't recall, really.

Q. Tell me what you did, where you went, if any place, in the car?

A. We drove around town first and drove out the Jesup Highway and turned around; and on the way back or out, I don't remember, stopped at the well. We were home by twelve.

Q. You went out the Jesup Highway to the flowing well?

A. Yes, sir, and drank water.

Q. Do you remember who was driving going out there or coming back?

A. I think Betty was driving.

Q. Where were you and Leroy when you went out and when you were coming back?

A. In the back seat.

Q. And you got back to the Eberhardt's house at twelve, you say? Is there anyway you remember that?

A. Yes, sir, they were playing the national anthem on the radio. I remember definitely.

Q. Did the station sign off at twelve?

A. Yes, sir.

Q. You knew that already?

A. Yes, sir.

Q. And the national anthem was playing?

A. Yes, sir.

Q. You went to the Eberhardt house. Did you and Betty get out?

A. Yes, sir.

Q. You spent the night with her?

A. Yes, sir.

Q. How long did the boys stay there after they took you home?

A. We went right in. I would say they were gone in five minutes or less.

Q. They didn't go in?

A. No, sir, just walked us to the door.

Q. I don't suppose you know who drove, or do you?

A. No, sir, we had already gone in the house.

Q. How was the weather as you drove back from the well—foggy or not?

A. It was. That's the reason they were afraid to let me drive.

Q. What kind of fog—patchy or solid sheet? Would you hit a spot of fog and come out and hit another?

A. I think so—yes—I wouldn't say—yes, sir.

Q. It was spotty or patchy fog?

A. Yes, sir.

Q. State whether or not you all had anything alcoholic to drink that night?

A. No, sir—ice cream and cake at the party.

Q. Did you have anything to drink after you left the picture show?

A. No, sir, we didn't stop anywhere except at the well.

Q. Had you ever been out the Jesup road with the Beckham boy before?

A. No, sir, I had only known him since he had been home on leave, and that was my first date with him that night.

Q. You hadn't known him before?

A. No, sir, I had heard the other boys speak of him quite often, but I had only knew him since he came home.

Q. Well, you said you were with them, though, all evening from the time the party started until the time they put out at the Eberhardt home at twelve. You were with these two at least all that evening?

A. Yes, sir.

Q. And you are in position to say of your own knowledge whether or not they had anything to drink all evening?

A. I am sure. Perman and Leroy picked me up, because we wanted to be at her house before she got there. We wanted it to be a surprise. They were at my house before the party. They had to wait for me to get dressed, and I was with them the rest of the evening.

Q. The Beckham boy, you said, was in service and was at home on leave?

A. Yes, sir.

Q. How about the Tyre boy?

A. He was in school.

Cross Examination.

By Mr. Bennett:

Q. Mrs. L[illegible]ran, how long had you lived in Brunswick prior to the occasion we were talking about?

A. I believe I moved there when I was in the eighth grade.

Q. Some four or five years?

A. Yes, sir.

Q. Did you know Perman Tyre pretty well?

A. Yes, sir.

Q. He was then in high school?

A. Yes, sir, I had known him ever since I had been living there, but I don't know him real well up until—

Q. I believe you say on this particular night there was a surprise party for the—

A. Betty Farrell.

Q. At her aunt's?

A. Yes, sir, at her aunt's house.

Q. Do you know who drove to the theater in the car when you left your aunt's house?

A. No, sir, I don't know there were more people in the car when we left the house—I know there were more than Betty and me but I don't know who drove.

Q. Did you drive the car before you went to the theater?

A. No, sir, afterward.

Q. Did you start off driving after you left the theater?

A. I don't think so. I don't really remember.

Q. Do you know who started driving the car when you left the theater?

A. Either Perman or Betty, I am not sure. I know she drove most of the time we were in the car.

Q. Do you know how long whoever was driving drove before you took the wheel after you left the theater?

A. I wanted to drive when we first got in the car. I had just gotten my driver's license. They were afraid for me to drive. Perman or Betty drove first, and then I drove for a few minutes.

Q. Inside of the city?

A. Yes, sir.

Q. In other words, it was foggy inside of the city?

A. Yes, sir.

Q. You didn't drive very far?

A. No, sir, I didn't.

Q. Can you tell us how far you drove—blocks or miles, if you recall?

A. I don't remember.

Q. Would you say two or three blocks or half a mile?

A. Oh, I would say one mile, at least.

Q. You were trying out your new driver's license?

A. Yes, sir.

Q. Did you put on brakes except just to stop the car when you were finishing your driving to turn it over to somebody else?

A. The best I remember that's about all we did, stop and start.

Q. I'm talking about you when you were driving?

A. That's what I mean, because I didn't know how to very well.

Q. Who suggested that drive out to the well, or was a suggestion made that you drive out to the well?

A. I don't think so.

Q. How did you happen to go out that road?

A. Just a place to go.

Q. All the young people went out there?

A. Just something we usually did before we went home.

Q. Had you ever been out there before?

A. Yes, sir.

Q. To the flowing well?

A. Yes, sir.

Q. Had you ever been out there with Perman?

A. No, sir.

Q. Or in the car when he had gone?

A. No, sir, not that I remember.

Q. He was a part of the young people who went out there, is that true?

A. Yes, sir.

Q. Do you know about how far that flowing well is from town—do you have any idea?

A. No, sir, I don't. It has been so long I have about forgotten.

Q. I believe you said it is known as the Jesup Highway where the flowing well is?

A. Yes, sir.

Q. Is that the same highway on which you learned the boys were killed—where the accident happened?

A. Yes, sir.

Q. Did you all discuss on the way out the fog?

A. Yes, sir, we did. That's the reason they were afraid to let me drive, because it was foggy.

Q. Even in spite of the fog you all still went on out?

A. Yes, sir.

Q. No one suggested you not go on account of the fog?

A. Not that I remember.

Q. It is your recollection that the Farrell girl was driving out there?

A. Yes, sir, I am almost positive.

Q. On your way out, you had to cross the railroad track, didn't you?

A. Yes, sir.

Q. You came back the same way?

A. Yes, sir.

Q. And you had to cross the same railroad track?

A. Yes, sir.

Q. Did you discuss the fog with Leroy, and was it mentioned to him or was it mentioned to you?

A. I don't remember. I just remember the four of us talking how bad it was.

Q. He knew it was foggy just like you did, didn't he?

A. Yes, sir.

Q. How many times would you say you had been out to that well, just—

A. I don't have any idea.

Q. How many times?

A. Well, I used to drive out with my family in the afternoons or Sunday afternoons. I don't have any idea.

Q. Had you been out there a number of times with your people in high school?

A. I wouldn't say that—no, sir.

Q. But you had been out there a number of times before?

A. Yes, sir.

Q. You referred to the playing of the Star Spangled Banner—on the car radio?

A. Yes, sir, when we drove up in the yard, because we had to be home by twelve.

Q. They took you on in and left?

A. Yes, sir, walked us to the door and left.

Q. Perman was in the front seat with the Farrell girl?

A. Betty—yes.

Q. And you were in the back seat with Leroy?

A. Yes, sir.

Q. The others that had gone with you to the theater didn't join you?

A. No, sir, we all separated after we left the movie.

Re-Direct Examination.

By Mr. Highsmith:

Q. Do you know whether or not Mrs. Jimmie Shell is expecting a baby soon?

A. Yes, sir.

(End of Deposition.)

Mr. Mozingo:

Now, if Your Honor please we served a request for admission of certain facts on the defendant and I would like to read those to the jury at this time.

The Court:

All right.

Mr. Mozingo:

Gentlemen of the Jury, under the law we have a right to serve a request for admission of certain facts by the defendant and if they answer them, and admit them, then we do not have to prove it. We did that in this case.

We asked them to admit—One (1): At the time of the collision of the 1950 Oldsmobile "88" automobile and Defendant's train at about 12:30, A. M., October 25, 1951, at Pyles Marsh Crossing on U. S. Highway No. 25, near Brunswick, Georgia, Defendant's train completely blocked the said Pyles Marsh Crossing." That was admitted.

No. 2: "Defendant's train referred to in Request No. 1 consisted of ninety-two (92) freight cars." That was admitted.

Number 3, they deny that. "The type of freight cars making up Defendant's train referred to in Request No. 1, were what is known as 'gondola' cars." They deny that, and say that the allegation made in Request No. 3 is not admitted that the cars were known as "gondola" cars, that there were cars of other type.

Number 4 was denied, that is: "Immediately prior to and at the time of the collision referred to in Request No. 1, no flares or fusees were burning at the Pyles Marsh Crossing on U. S. Highway No. 25 near Brunswick, Georgia." They deny that.

Number 5, they admit. That is: "Immediately prior to and at the time of the collision referred to in Request No. 1, no agent, servant or employee of the Defendant was stationed at the Pyles Marsh Crossing on U. S. Highway No. 25 near Brunswick, Georgia, to flag or otherwise warn motorists of the presence of Defendant's train upon said crossing."

Number 6 is admitted: "Immediately prior to and at the time of the collision referred to in Request No. 1, Defendant maintained no gates at the Pyles Marsh Crossing on U. S. Highway No. 25, near Brunswick, Georgia."

Number 7 is admitted: "Immediately prior to and at the time of the collision referred to in Request No. 1, Defendant maintained no blinker or other warning lights at the Pyles Marsh Crossing on U. S. Highway No. 25, near Brunswick, Georgia."

Number 8, about the "X" cross sign is denied. Number 9 is denied.

Number 10 is admitted: "The type of railroad car which was struck by the 1950 Oldsmobile '88' automobile referred to in Request No. 1 was a black gondola type car, which was empty."

Number 11 is admitted: "The railroad car which was struck by the 1950 Oldsmobile automobile, referred to in Request No. 1, was owned by the Defendant."

Number 12: "Immediately prior to and at the time of the collision referred to in Request No. 1, Defendant's signs at its Pyles Marsh Crossing, near Brunswick, Georgia, contained no luminous markers or reflectors of any kind." That is admitted.

Number 15: "The railway car which was struck by the 1950 Oldsmobile on U. S. Highway No. 25 near Brunswick, Georgia, was the 9th railway car from the rear end of the said train, or the 83rd car from the front of said train." That was admitted.

Number 16: "The angle at which Defendant's tracks cross U. S. Highway No. 25 at Pyles Marsh Crossing, near the City of Brunswick, Georgia, is today the same as it was at the time of the collision referred to in Request No. 1." That's admitted.

(End of Admissions.)

Mr. Mozingo:

There was one other deposition of the other young lady which was in the car.

The Court:

Do you all have any objection, Mr. Pedrick?

Mr. Pedrick:

If he wants to read it, all right. We took the deposition in Atlanta ourselves, Your Honor.

The Court:
I thought it was his deposition.

Mr. Pedrick:
Well, we took the deposition of a young lady in Atlanta, and they took the deposition of one in Valdosta.

Mr. Mozingo:
That's right, Your Honor. They were occupants of the car. This is the one he took.

The Court:
Well, I think it would be better practice to let Mr. Pedrick read his own deposition.

Mr. Pedrick:
Well, if he wants to, Your Honor.

The Court:
Well, I think it would be better practice for each one to read his own deposition.

Mr Mozingo:
Your Honor, do I understand that Mr. Pedrick is going to offer that deposition, but if he is not, then before we close our case we want the jury to have it.

The Court:
Are you going to offer it, Mr. Pedrick? You said you had no objection, I believe. He says he wants to close his case.

Mr. Mozingo:

If he assures me he is going to offer it, that's all right.

The Court:

Are you going to offer it?

Mr. Pedrick:

Well, if we get to put on our evidence. We don't know what turn the case will take, Your Honor.

The Court:

Well, he said if you are not going to introduce it he wants to introduce it before he closes his case.

Mr. Pedrick:

I understand, but at times cases take a different turn.

The Court:

Well, you had better let him introduce it then.

Mr. Pedrick:

Well, that's all right. As I said before, we had taken the evidence for a specific purpose but if he wants to introduce it, all right.

The Court:

That's all right. You gentlemen of the jury will understand that this is Mr. Pedrick's witness, but Mr. Mozingo is going to read the deposition to you, although the witness purports to be the defendant's witness. Mr. Mozingo is going to introduce it himself.

Mr. Mozingo:

Gentlemen, Mr. Pedrick took the deposition of this young lady, who was the other occupant in the car. It is the deposition of Mrs. Jimmie Shell, nee Miss Betty Farrell, taken on behalf of the defendant, pursuant to the annexed notice, and so forth. Mr. E. Way Highsmith appeared for the plaintiffs, and Mr. John W. Bennett appeared for the defendant.

MRS. JIMMIE SHELL, being first duly sworn, deposed and testified as follows:

Direct Examination.

By Mr. Bennett:

Q. What is your name, please, ma'am?

A. Betty Shell.

Q. Where are you living at the present time?

A. In Atlanta.

Q. Atlanta, Georgia?

A. Yes, sir.

Q. State whether or not you were single in October of 1951?

A. Yes.

Q. And what was your name before your marriage?

A. Betty Farrell.

Q. Where were you living and with whom in October of 1951?

A. I was living in Brunswick, Georgia, with Mrs. T. P. Eberhardt.

Q. What relationship was she to you?

A. She is my aunt.

Q. State whether or not you recall the occasion when Perman Tyre, Leroy Beckham and another boy named Leonard Holmes were killed. Do you recall the time of the occasion?

A. Yes, sir.

Q. I will get you to state whether or not you had been with Perman Tyre and Leroy Beckham on the evening that they were killed?

A. Yes, sir.

Q. What did your aunt have at her home on that evening for you?

A. A birthday party.

Q. With whom did you leave your aunt's home that evening?

A. With Perman—it was a whole crowd—we all went to the show. I couldn't name everybody in the car. We just all piled into several cars.

Q. Well, was Perman in the car?

A. Perman and Leroy.

Q. Perman and Leroy, they were in the car?

A. Yes. The Holmes boy wasn't.

Q. The Holmes boy was not?

A. He wasn't there.

Q. After the picture show did you get in anybody's automobile?

A. Yes, sir.

Q. Whose automobile?

A. The Beckham family's car.

Q. The Beckham's family car?

A. Yes.

Q. Who else was in the car at the time you got in it?

A. Mary Ruth Edgar and Leroy Beckham and Perman Tyre.

Q. Who was driving the car when you left the picture show?

A. I believe the Beckham boy was driving, it's been so long.

Q. That is your best recollection?

A. Yes.

Q. Did you drive the car any that evening?

A. Yes, sir.

Q. Did anyone drive the car other than you and the Beckham boy?

A. No, sir. I don't believe Perman Tyre drove. It's been so long. They switched around every time we left somewhere. It seemed like when we left my house I believe the Beckham boy was driving. I believe he drove after the show and I took over and drove.

Q. Did all four of you ride outside of the City of Brunswick?

A. Yes, sir.

Q. State where you went when you rode out?

A. Rode around town first.

Q. Well, after that?

A. What is the name of that highway?

Q. Do you recall what highway it was?

A. It was the highway where the Well is on, is it 342?

Q. Do you know whether or not it was the road that went to Jesup, known as the Jesup Highway?

A. Yes, sir.

Q. Who was in the car when you rode out the Jesup highway?

A. The Beckham boy, Perman Tyre and Mary Ruth Edgar and I.

Q. And you were driving at that time?

A. Yes.

Q. And where did you say you went when you went out that road?

A. We went out to the Well.

Q. What is the Well?

A. Just a little well, you just drink water and we turned around.

Q. A flowing well?

A. Yes.

Q. It was on that highway from Brunswick to Jesup?

A. Yes.

Q. How did you come back to Brunswick, on what route?

A. The same way.

Q. The same way. Now, in going out to the well from the city limits of Brunswick and coming back, you had to cross a railroad, didn't you?

A. Yes, sir.

Q. Is this the same highway that the two boys were killed on?

A. Yes, sir.

Q. When I refer to the two boys I mean Perman Tyre and Leroy Beckham.

A. Yes, sir.

Q. When you returned from the Well did you go straight home?

A. Yes, sir.

Q. About what time was that?

A. 12:00. We were home by 12:00.

Q. Midnight?

A. Yes.

Mr. Bennett:

I think the witness is with you.

Cross Examination.

By Mr. Highsmith:

Q. Betty, how old were you at that time, when were you born?

A. October 24, 1932.

Q. October 24?

A. Yes.

Q. 1932?

A. Yes.

Q. October 24, 1932. Well, this happened on your birthday then?

A. Yes.

Q. How old were the boys, about how old were they, were you all in high school together?

A. No, I had finished high school.

Q. You had?

A. Yes, and I think Perman was 18. The Beckham boy was a little older. I don't know. He was in his 20's. I didn't know the Holmes boy.

Q. The Beckham boy, I believe, was in the Service. He was home—

A. Yes.

Q. —On a furlough?

A. Yes.

Q. From the Service?

A. Yes.

Q. And Leonard was in high school?

A. Yes.

Q. And the Tyre boy?

A. Was in high school.

Q. Was a high school student at the time, and the birthday party was held at your aunt's house?

A. Yes.

Q. Who arranged the party?

A. My aunt and Perman.

Q. Your aunt and Perman?

A. Yes.

Q. It was a surprise party, I believe, wasn't it?

A. Yes, sir.

Q. And about what time was it when you left home to go to the picture show?

A. It was about 9:00 or a little after.

Q. 9:00 or a little after?

A. Somewhere between 9:00 and 9:30.

Q. Oh, I meant to ask you, did you have any refreshments at the party?

A. Yes, sir.

Q. You did? What did you have?

A. What you usually have, ice cream and cake.

Q. Nobody was drinking anything alcoholic that night?

A. No, sir. My aunt thought I was a child then. She would turn over now if she knew I even thought about it.

Q. Did any one of the boys drink anything alcoholic while you were there with them that night?

A. No, sir, they did not.

Q. Do you remember about what time it was when you got out of the picture show?

A Between 11:00 and 11:30, somewhere around there

Q. Between 11:00 and 11:30. And then you said you drove around the City limits.

A. Yes.

Q. A while?

A. Yes.

Q About what time would you say it was when you went out to the Well?

A. Golly, I don't have any idea. I don't know how long it takes to go out there, anytime. I know we were home by 12:00 and we rode around in town and then rode out there and back.

Q. Did you come straight from the Well to your home?

A. Home, yes.

Q. Straight from the Well and you know you got home at 12 o'clock?

A. Yes.

Q. It was very foggy on the road that night, wasn't it?

A. Very foggy.

Q. Very foggy?

A. Yes, sir.

Q. All along the road?

A. It was real, real bad that night. We commented on it.

Q. It was real, real bad?

A. Yes.

Q. The road was wet from the fog, I suppose?

A. Yes, sir, it was most like rain it was so foggy.

Q. And that was true at the railroad crossing where you crossed?

A. Well, I didn't pay any attention to any particular place. It was just foggy all over.

Q. It was foggy all over. How long had you known these two boys, Betty?

A. Well, I hadn't known the Beckham boy but just while he had been home on leave.

Q. While he had been home on leave?

A. And I had known Perman, let's see, about three months, I guess. I mean, I had seen him. I had known of him but I hadn't dated him.

Q. You had been dating him for about three months?

A. I imagine it had been that long.

Mr. Highsmith:

I believe that is all.

Mr. Bennett:

We have no further questions.

H. C. WATTS, Sworn for the Plaintiffs, testified as follows:

Direct Examination.

By Mr. Mozingo:

Q. What are your initials?

A. H. C. Watts.

Q. Where do you live?

A. 1803 Goodyear.

Q. That is here in Brunswick, Georgia?

A. Yes, sir.

Q. By whom are you employed, and what is your position, Mr. Watts?

A. I am night manager of the Western Union.

Q. How long have you had that position, Mr. Watts?

A. I have been down here about six years.

Q. About six years. How long have you been connected with Western Union?

A. I was with the Postal and they bought the Western Union out in '43 and I have been with them since then.

Q. Since then. Did you ever know a boy by the name of Leonard Holmes?

A. Yes, sir.

Q. Where did you know him?

A. He worked for us.

Q. And when did he work for you, Mr. Watts?

A. I don't remember. He was here working when I came down here, around six years ago, I believe.

Q. What job did he have?

A. A messenger boy.

Q. A messenger boy?

A. Yes, sir

Q. Did you know the boy real well?

A. Well, he was in the office. I didn't know him on the outside. He was all right around the office.

Q. Was his work here satisfactory with you as a boy?

A. Yes, he was a good boy.

Q. Was he eager to work?

A. Yes, he was always on time, and a good boy.

Q. A good boy. Did he make you a good employee?

A. Yes, sir.

Q. He was a high school boy at that time, I believe?

A. Yes, sir.

Q. You don't know exactly what pay he drew, do you?

A. No, sir.

Q. You don't know how much money he made as a messenger boy?

A. No, sir, I don't know exactly. I don't handle that end of it.

Q. Did Leonard get along all right with the other employees?

A. He was always sociable, yes, sir.

(No Cross Examination.)

EARL WALKER, Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Mozingo:

Q. I believe you are Mr. Earl Walker?

A. That's right.

Q. You live here in Brunswick?

A. I do.

Q. And what is your business?

A. I operate a grocery store, a retail grocery store.

Q. You operate a retail grocery store. And how long have you been in the grocery business?

A. 23 years.

Q. I see. And during that time that you have been in the grocery store business did you ever have occasion to know a young fellow here in town by the name of Perman Tyre?

A. I did.

Q. How did you happen to know him?

A. He was in our employ for sometime.

Q. Was he attending school during the time he was working for you?

A. Yes. He was working for me part of the time during the afternoon and on Saturday and sometime in vacation.

Q. In other words, he worked for you during his vacation some and on Saturday and in the afternoons when he wasn't attending school?

A. Yes, sir.

Q. What kind of a boy did you find him to be?

A. He was a good steady boy. We used him in the store as a stock clerk, and he also drove a truck too.

Q. I see. Did he get along all right with the other employees and the public?

A. Oh, yes.

Q. Did he seem to be a boy that was eager to learn and a hard worker?

A. Yes, sir.

Q. All right, sir. Was he working for you at the time he was killed?

A. Not right at that time, no, sir.

Q. But he had been employed by you?

A. Oh, yes.

Cross Examination.

By Mr. Mozingo:

Q. Did he drive your truck some, Mr. Walker?

A. Yes, sir.

Q. Then he was familiar with the driving of automobiles?

A. Yes, sir, I presume so. He had a driver's license.

T. E. GLOVER. Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Mozingo:

Q. Mr. Glover, I believe your name is Mr. T. E. Glover?

A. That's correct.

Q. You live here in Brunswick?

A. Yes, sir.

Q. I see. And what street do you live on?

A. The business or the residence.

Q. Your business address?

A. 1506 Richmond.

Q. I see. And what business are you engaged in?

A. Printing and stationery.

Q. Mr. Glover, how long have you been in that business?

A. Oh, about 50 years.

Q. During that time, did you ever have occasion to know a young fellow here in town by the name of Perman Tyre?

A. Yes, sir. He worked for me.

Q. He worked for you?

A. Yes, sir.

Q. How long did he work for you?

A. I looked on the records, he came to work for me on September 14, 1951, and he worked through October 22nd, 1951. He was killed in an accident on October 24th while he was working for me.

Q. In other words, he was employed by you at the time he was killed in an accident?

A. That's correct.

Q. What sort of a worker was he, as a boy there?

A. Well, I considered him a very good boy. He worked for us over a period of about six weeks, something like that. He had to do with some of the collection and the delivery and working in the store. He was very satisfactory.

Q. I see. Did he seem to be an ambitious young fellow?

A. Yes, sir. He was a nice boy.

Q. He was eager to listen and learn.

Mr. Pedrick:

Your Honor, this is an intelligent witness.

The Court:
Yes, that is leading.

Mr. Mozingo:
All right, sir.

Q. He was satisfactory with you then?
A. Yes, sir.

Cross Examination.

By Mr. Pedrick:
Q. Mr. Glover, did he drive your car or truck or anything?
A. Yes, sir.

Re-Direct Examination.

By Mr. Mozingo:
Q. In other words, you considered him responsible enough to allow him to drive your truck?

Mr. Pedrick:
Your Honor, I still think counsel ought not to testify himself.

The Court:
I think that is a proper question.

The Witness:
Yes, sir.

(Witness Excused.)

ERNEST DRURY, Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Mozingo:

Q. You are Mr. Ernest Drury?

A. That's correct.

Q. Mr. Drury, where do you live?

A. I live in Brunswick, at 3175 Dartmouth Homes.

Q. What is your occupation?

A. At the present I am with my father who is an accountant in Brunswick.

Q. I see. Mr. Drury, were you asked by us to make some measurements?

A. Yes, sir, I was.

Q. Were you asked by us to measure the height from the cross-ties to the bottom of a gondola car that is used to haul pulpwood—a Coastline car?

A. Yes, sir.

Q. Do you have those measurements with you? Do you recall what they were?

A. The top of the rail to the car there was 29 3/4 inches, I believe. May I look at my notes?

Q. Certainly?

A. I took the measurement there from the cross-ties to the car body there, and found that it was 33 3/4 on one car, and because of the differences in the cross-ties, they were old cross-ties, and I had to chase the train down in order to get them, but the other one was 35 3/4. In other words one was 33 3/4 and one was 35 3/4.

Q. Will you step right down here just a minute? In other words, you measured—show them where you measured from?

A. I measured from—of course you have your cross-ties here and the rails on top of that, and I measured from the top of one cross-tie to this body right here.

Q. And how much did you find that to be now?

A. I found that to be 34 3/4 on one, and 35 3/4 on the other one. The difference is accounted for there because they were not new cross-ties. They were old ones.

Q. Did you have occasion, or were you asked by us to measure, or to make certain measurements on a 1950 Oldsmobile "88"?

A. Yes, sir, I did.

Q. All right, sir. What were you asked by us to measure there?

A. I was asked to measure the height from the ground to the motor, and I was asked to measure the height from the ground to inside the radiator with the hood up.

Q. All right. Now, lets see, from the height of the ground, that is, the ground itself, to the inside of the motor. What part of the motor did you measure?

A. I measured the top most part there. This happened to be a 1950 Oldsmobile—the top of that motor there where it says "rocket".

Q. Now, you are talking about the block of the motor?

A. The block, that's right.

Q. Is that the part you see here in this picture right here?

A. That is not exactly the way I measured it.

Q. No, I know, but it is the top of the block of the motor?

A. Yes, sir.

Q. That is not the top of the hood?

A. No, sir.

Q. The top of the block? Now, how far did you find it was from the ground to the top of the steel block there?

A. I found that it was 31 inches.

Q. That was 31 inches?

A. Yes, sir.

Q. All right. Now, what other measurements did you make on this Oldsmobile?

A. I took it again from the ground up to the radiator, right next to the radiator cap, which would be the center of the automobile.

Q. What was that?

A. I found that to be 40 inches.

Q. So you found the hight of the gondola car, the side of the gondola car, some two inches or so higher than the top of the block of this 1950 Oldsmobile?

Mr. Pedrick:

Your Honor, that is not the testimony.

Q. What was your height of the car, the height from the bottom of the gondola? I thought you said just now that it was—what?

A. I said that it was 34 3/4 and 35 3/4.

Q. And to the top of the block it was 31?

A. That's right.

Cross Examination.

By Mr. Pedrick:

Q. What was it, Mr. Drury, that you said was 29 inches?

A. He asked the question how far it was from the rail to the gondola. I measured the rail—from the cross-tie to the rail it was five inches, and I subtracted that in order to get that answer, sir.

Q. You found that was 29 inches?

A. That was 29 3/4, if you subtract 34 3/4 from that—take five inches, you will find that it is 29 3/4.

Q. Is that the type of car that you measured?

A. No, sir.

Q. That is not?

A. No, sir, that is not.

Q. What type did you measure?

A. The one I measured, it seems like it did not have that top there as noticeable as it is. I can give you the car numbers, if you wish.

Q. I wish you would, if you have it?

A. ACL 90457. ACL 90420.

Q. 90420 and 90457?

A. Yes, sir.

Q. Now, did you measure at the end or in the center?

A. I measured in the center, sir.

Q. In the center?

A. Yes, sir.

Q. And what was it on this car that you say—on the one that you measured that is not on here?

A. Sir, I was not at this distance as if to look at the car. I was caught in between cars. I couldn't see it from a distance like this. For example, I couldn't say that it looked exactly like that. I took the measurements and I looked to see if it was an ACL car and I went to the center of the car approximately

Q. Well, you don't know whether that is—did you have any particular description of the car that you were to measure? How did you pick out the car?

A. There were only two ACL cars in that bunch. We hunted all around Brunswick yesterday for some and I had to take the only two that I could find and that was just a few minutes ago, sir.

Q. That was when?

A. Just a few minutes ago.

Q. That car is in the Brunswick yard now?

A. That is correct.

Q. These two cars?

A. Yes, sir, I caught them coming into town.

Q. You caught them?

A. Yes, sir. I was out about my home when I saw them coming down Cochran Avenue.

Q. And you say you were wedged in between the two cars?

A. That was after they had come to a stop down here at the south end yards.

Q. Now, the distance that you measured was from the top of the rail to the bottom side of the car?

A. No, sir. I did not say that. I said I took the measurement from the cross tie up to the body of the car.

Q. Well, what was that measurement?

A. I said that measurement was 34 3/4 on one, and 35 3/4 on the other one.

Q. And the difference was explained why—it was the same car, was it?

A. Yes, sir. They were very old switch ties. They were broken and warped up and warped down. There weren't any even ones that I could take.

Q. Then you measured from the tie to the top of the rail? Did you say that?

A. Yes, sir.

Q. And what was it?

A. Five inches.

Q. And that was in each case?

A. I didn't make but one measurement, sir.

Q. What ?

A. I didn't make but one measurement.

Q. You made two measurements from the tie to the bottom of the car, didn't you, one tie here and one tie there?

A. Yes, sir.

Q. But you didn't measure the rail from each tie, did you?

A. No, sir.

Q. What was the height of the rail?

A. The rail was five inches from the cross-tie to the uppermost part of the rail.

Q. But the track that you measured it on, the rails were protruding up like they are in that?

A. Yes, sir, that's true.

Mr. Pedrick:

Will you mark this D-4, please. (referring to the Reporter.)

Q. I show you a photograph, Mr. Drury, that has been identified as D-4, that shows a crossing, where the rail, there in that picture, is shown almost even with the highway there, does it not?

A. Yes, sir.

Q. The top of the rail?

A. Yes, sir.

Q. So, that if you had measured from the top of the rail there, or the crossing, or the level of the crossing to the car there, it would have been that distance 34 3/4 less, or some 29 inches, would it not?

A. I was in danger of those cars moving.

Q. I can understand that, but in that picture there, that would have been a measurement, if you were trying to find the distance from that level of that crossing to the bottom of the car it would have been about that 29 or something inches, if that car had been there?

A. Yes, sir, it would have been 29 3/4 inches—or 30 3/4.

Q. That's right, and the measurement of the automobile that you testified about, what make or what model was that?

A. The model was an Oldsmobile.

Q. Oldsmobile, what year?

A. 1950.

Q. 1950. And the top of the block there was some 31 inches. or what was it?

A. It was 31 inches above the ground.

Q. Just what kind of a car was it that you measured? Do you know?

A. Yes, sir, it was a 1950—

Q. No. I am talking about the railroad car?

A. Oh. In my vernacular it is a high-side "Gon", I would call it. I don't know what it would be in the railroad vernacular.

Q. And you say that it is not like this?

A. Sir, I cannot say for sure. I was not at a point to judge in similarity to that. I was right up at it, sir.

Mr. Pedrick:

Your Honor, we want to object and move to rule out all of his evidence, because there is no evidence to connect this testimony with any particular car that was hit by the car in which the sons of the plaintiffs were riding.

The Court:
What do you say to that?

Mr. Mozingo:
In their admissions they say it was a high side gondola, and he said that was what he measured, and we think it is admissible under their own admission.

The Court:
I don't know whether it was a high side gondola or not.

Mr. Mozingo:
I don't know whether the picture of the one he has is either. He said the car they hit was a high side gondola.

The Court:
Was it a high side gondola?

Mr. Fedrick:
He said he didn't know.

Re-Direct Examination.

By Mr. Mozingo:
Q. What did you measure?
A. I measured a car that was of metal construction. It came up to so high on me.
Q. What did you call it?
A. I called it a "high side gon".

The Court:
Was that a high side gondola car that you measured?

The Witness:
Yes, sir. I have loaded them.

Q. You have loaded them?
A. Yes, sir, I have loaded them.

The Court:
I think under that it would be admissible. You can go down.

Mr. Mozingo:
Your Honor please, a boy at age 20 has a 41.46 expectancy, and a boy at 18 has a 42.87. This is the Mortality Table and we offer this Mortality Table in evidence.

The Court:
All right, any objections?

Mr. Pedrick:
No, sir.

The Court:
It is admitted without objection.

Mr. Mozingo.
This is a certified copy of the Public Service about the cross-arm sign I hand to counsel and then I want to offer it.

Mr. Pedrick:
I will have to have time to read it.

The Court:
Do you object to it?

Mr. Pedrick:

Yes, Your Honor, we object to it upon the ground that there is no evidence here—there was no sign of that character. It is a provision of the Public Service Commission with respect to cross buck signs, and we object to it because there is no evidence here that that sign was not erected at the crossing.

The Court:

What do you say, Mr. Mozingo?

Mr. Mozingo:

All right, sir, we will withdraw it, if they object to it.

The Court:

All right.

(Witness excused.)

MRS. WOODROW SAPP, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Mozingo:

Q. Are you Mrs. Woodrow Sapp?

A. Yes, I am.

Q. Mrs. Sapp, talk out loud enough so these gentlemen over here can hear you, please Ma'am, and so the Reporter can take it down. Where do you live, Mrs. Sapp?

A. 2119 "K" Avenue.

Q. You live here in Brunswick, Georgia?

A. Yes, sir.

Q. And how long have you lived in Brunswick, Georgia?

A. All of my life.

Q. All of your life. Mrs. Sapp, did you have a son by the name of Leonard Holmes?

A. Yes, sir.

Q. I believe your husband, Mr. Holmes, died some good many years ago?

A. Yes, sir, six months before Leonard was born.

Q. I see. Now, when Leonard was born, who did Leonard live with?

A. The baby was born in mother's house.

Q. Leonard was born in your mother's home?

A. That's right.

Q. And he lived in the home there with you and your mother?

A. Yes, sir.

Q. And when was he born?

A. The 28th of December, 1932.

Q. The 28th of December, 1932. All right, now, you were later married to Mr. Sapp?

A. Yes, sir.

Q. Did Leonard continue to live in the home with his grandmother?

A. Yes sir.

Q. Where did you live then?

A. You mean with Woodrow?

Q. Yes, you and Mr. Sapp?

A. 2104 Bartow Street at that time.

Q. Do you have any other children?

A. Six.

Q. You have six other children?

A. Yes, sir.

Q. Now, at the time of Leonard's death, was he working?

A. Yes, sir.
Q. Was he helping you in any way?
A. Yes, sir, he taken care of my mother. He used is money to help to take care of her.
Q. When he was taking care of your mother, how was he helping you?
A. He was taking my place. I would have had to do it, if it wasn't for him.
Q. Since his death are you taking care of her?
A. Yes, sir, I give her $50.00 a month.
Q. Where did Leonard go to school?
A. Glynn Academy.
Q. Glynn Academy. What class was he in?
A. The 11th grade.
Q. The 11th grade at the time of his death?
A. Yes, sir.
Q. Did you see him very--how often did you see him when he was living with his grandmother?
A. Every day.
Q. Did Leonard ever do any work as a boy?
A. Yes, sir. He worked at the Brunswick News for a while.
Q. What was his job with the Brunswick News?
A. He had a paper route.
Q. And where else did he work?
A. At the Starlight Theater as an usher boy.
Q. All right, did he have any other job during the time?
A. Down at the Western Union.
Q. Who helped to take care of your grandmother besides Leonard?
A. Leonard took care of her. All he made went to her.
Q. His grandfather is dead too?
A. Yes, sir.

Q. Let me ask you this about Leonard as a boy; what sort of a boy was he? Did he ever give you any trouble?

A. No, sir. He was an exceptionally good boy.

Q. Did he work around there and help out?

A. He was very smart.

Q. I see. Was he fairly good in school?

A. Yes, sir.

Q. Was he an ambitious boy?

A. Yes, sir, he was.

Q. Do you have a photograph of him?

A. Yes, we have one.

Q. You say you never had any trouble with him?

A. No, sir.

Cross Examination.

By Mr. Pedrick:

Q. Leonard, you said, lived with his grandmother? Is that what you said?

A. That's right.

Q. How far were they from where you lived?

A. You mean how many blocks?

Q. Yes, not accurately, but approximately?

A. About a mile, I reckon.

Q. About a mile?

A. Yes, sir. I lived on Bartow street.

Q. Did Leonard know how to drive an automobile?

A. Yes, sir.

Q. Did he own one?

A. No, sir, but he had owned an old broken down car. He didn't get to drive it much. It was an old wreck.

Q. One that you work on about as much as you drive?

A. That's right.
Q. He did know how to drive an automobile?
A. Yes, sir, he knew how to drive.

Re-Direct Examination.

By Mr. Mozingo:
Q. Did you ever ride with him when he was driving?
A. Yes, sir, in my car.
Q. Did you ever know him, when he was in a car, to go across this crossing out there?
A. No, sir.
Q. Did he go to school out in that direction?
A. No, sir. He went to Glynn Academy.
Q. You never rode across this crossing with him?
A. No, sir.
Q. He had no work out that way?
A. No, sir. We would just ride around here in town and he would go with me out to my sister's.
Q. As far as him being familiar with the crossing, you don't know about that? You didn't go out there with him?
A. No, sir.

Re-Cross Examination.

By Mr. Pedrick:
Q. You are not in position to say that Leonard didn't know that there was a railroad crossing out on the Jesup Highway?
A. I hadn't ever heard him mention it.
Q. You are not in position to say that he didn't drive his car, or some one else's car out there?
A. I don't believe his car would have got that far out there.

Q. You don't know whether he knew about the crossing?

A. I don't know.

(Witness excused.)

MRS. JAMES H. TYRE, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Mozingo:

Q. You are Mrs. J. H. Tyre?

A. Yes, sir.

Q. Mrs. Tyre, what was the name of your son?

A Perman Tyre.

Q. And when was he born?

A. July 18th, 1933.

Q. Where do you live now, you and Mr. Tyre?

A. 1310 Dartmouth street.

Q. And how long have you lived here in Brunswick?

A. I would say about eleven years.

Q. You moved here when Perman was a small boy?

A. Yes, when he was a small boy.

Q. And where did he go to school?

A. He went to Glynn Academy.

Q. I see. How did he do in school?

A. Oh, we thought he done fair in school.

Q. I see. And did Perman ever do any work, other than going to school?

A. Yes, he always worked during the summer and after school hours.

Q. Where did he work? Who were some of the people he worked for?

A. Well, he worked for the Tide Water Construction Company, and Hayes Construction Company, and A & P Grocery, Mr. Walker's Grocery and then with Mr. Glover, who testified.

Q. Did he ever contribute anything to you, or give you any of the money he earned after school hours and on week-ends?

A. Yes, sir, he always brought his money home and it went in the general budget.

Q. Did he give you any money to put in the bank for him, or anything?

A. Well, he had a little money and we asked him to put it in the bank, and he said he wanted me to put it in the bank in my name.

Q. I see. Did he do that?

A. Yes, sir, he wouldn't have it no other way.

Q. Was the money there at the time he was killed in the accident?

A. Yes, sir.

Q. I see. Did he help you in addition to the work he did down town? Did he ever help you any around the home?

A. Yes, sir. He was always willing to help to do anything around the place to be done.

Q. I see. He seemed to be a pretty ambitious boy?

A. Yes, sir.

Q. At the time of his death, of course, he was single and living there with you all?

A. Yes.

Q. How old was he at the time of his death?

A. Eighteen.

Q. And he left no children?
A. No, sir.

No Cross Examination.

(Witness excused.)

MRS. ROY BECKHAM, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Mozingo:
Q. You are Mrs. Beckham?
A. Yes.
Q. Are you the mother of Leroy Beckham?
A. Yes, I am.
Q. Mrs. Beckham, how old was Leroy at the time of his death?
A. He was 20.
Q. Leroy never had been married?
A. No, sir.
Q. And, of course, had no children at the time of his death?
A. No, sir.
Q. Where did he live?
A. Well, he lived with us until he went into the service.
Q. At the time of his death was he in the service?
A. Yes, he was.
Q. I see. And what branch of the service was he in?
A. The Army Air Force.
Q. And where was he stationed?

A. At "Applecar", Ohio.

Q. How long had he been away in the service?

A. Fourteen months.

Q. Fourteen months?

A. Yes, sir.

Q. At the time of his death—when was the last time you saw Leroy?

A. I saw him in the afternoon—at least he taken me to town on a Wednesday afternoon of the 24th.

Q. I believe he had you all's automobile that afternoon?

A. Yes, sir.

Q. And that was the night he was killed, or the afternoon of the night he was killed, or early the next morning?

A. Yes, sir.

Q. Did you live here in Brunswick at the time he was a boy?

A. Yes, sir, I did.

Q. You don't know what pay he was drawing in the Air Force at the time of his death, do you?

A. No, sir, to be exactly, I don't. I couldn't say.

Q. I see. Now, did he finish highschool?

A. Yes, sir, he finished after he went in the service.

Q. Now, how did he finish after he went in the service?

A. Well, I guess he taken his—

Q. —Did they give a course there for service boys?

A. Yes, sir.

Q. Is that the certificate that he received for it, the letter with it?

A. Yes, it is.

Q. So, he had the equivalent of a highschool education?

A. Yes, sir.

Q. While he was in the Air Training Command, did you receive this certificate here, and I will ask you what that is?

A. Yes, sir.

Q. What is that certificate?

A. It is where he completed a course as Radar Operator.

Q. He was a Radar Operator?

A. Yes, sir.

Q. And this is a Certificate of Sufficiency?

A. Yes, sir.

Q. How long had he been home on leave before he was killed?

A. Only three days.

Q. Only three days.

A. Yes, sir.

Q. Is this the letter you received upon his death?

Q. That letter states his standing in the Air Force? Who is the letter from?

A. Chief of Staff of the United States.

Q. What is his name?

A. I don't know.

Q. It is Chief Hoyt Vandenberg.

Mr. Mozingo:

We offer to offer all of these in evidence.

The Court:

Any objections, gentlemen?

Mr. Pedrick:

We have no objection to the Certificate, which is known as a high school equivalency certificate, nor about the Certificate about the Air Training Com-

mand, but we do object to the letters. One is addressed to Lee R. Beckham, and the other one to Mr. and Mrs. Beckham and other parties upon the ground that it is hearsay. We have no way of cross examining the witnesses. It is the same as the witness testifying and we have no way to cross examine them.

Mr. Mozingo:
All right, sir, we withdraw the one as to Mr. Beckham, but the one received by Mrs. Beckham, we think gives his standing the Air Force from the Chief of Staff.

The Court:
I sustain the objection as to the letters addressed to different parties than the boy.

Mr. Mozingo:
The other one we think would be relevant to show that he had an Honorable Discharge there at the time of his death.

The Court:
That was issued after the boy's death?

Mr. Mozingo:
Yes sir, we think that is competent.

Mr Pedrick:
We don't think this adds anything at all if Your Honor please.

The Court:
That is the one issued after the boy's death?

Mr. Pedrick:

We have not denied that he was killed October 25th. It is wholly irrelevant.

Mr. Mozingo:

We won't insist on it. I will withdraw it.

The Court:

All right.

Q. Did you ever have any trouble with your son?

A. No, sir.

Q. What type of boy was he?

A. Leroy was a good boy. He gave us no trouble whatever. He was real smart in school.

Q. I see. Was he good to you and the rest of the members of the family?

A. Yes, he was a nice boy.

Q. I see. Is this a picture of him?

A. Yes, sir, that is my son, Leroy.

Q. When was this taken? Do you remember?

A. This was taken down at Caples' Studio, I believe, around the last of 1950, or either the first part of 1951. I am not sure.

Q. A year and some months before his death?

A. That's right.

Mr. Mozingo:

We would like to offer this in evidence.

Q. Were you receiving a dependency allotment from him while he was in the Air Force?

A. Yes, sir.

Q. How much was that?

A. $50.00 a month.

Q. Now, while he was at home and before he went there and while not working, did he ever help you around the home?

A. Yes, he certainly did.

Cross Examination.

By Mr. Pedrick:

Q. Mrs. Beckham, had Leroy been raised here in Brunswick?

A. Yes, sir, all of his life.

Q. For twenty years?

A. Yes, sir.

Q. How long had he been driving automobiles?

A. Well, he has been driving every since he was sixteen years old, when he got his driver's license.

Q. He drove all around Brunswick?

A. Yes, sir.

Q. Did I understand you to say that you lived outside of Brunswick?

A. I do now, yes.

Q. In 1951?

A. In 1951 I lived out at the Forks, on the Jacksonville Highway, at Walker's Trailer Court.

Q. Would that be—

A. Out beyond the Forks, out beyond the Jesup Highway.

Q. That would be on No. 17?

A. That's right.

Mr. Mozingo:

If Your Honor please, this is a photograph of Perman Tyre and we would like to offer it without putting her back up, if counsel will agree, and also that he was not married and left no children.

Mr. Pedrick:
I will concede that.

The Court:
All right, that's admitted.

Mr. Mozingo:
All right sir, two of one and one of each of the others. The reason in offering two of them is one of them is one of the young ladies he was with in the car that night he was killed.

Mr. Pedrick:
Now, I don't know about that, Your Honor. I don't know the relevancy of that.

The Court:
Well, submit them to counsel.

Mr. Pedrick:
We object to the relevancy of the picture of a group of people. He has already put in one picture.

The Court:
You have got one picture in which was taken from a group. You have that?

Mr. Mozingo:
Yes, sir. This is the young lady he was with that night. It is two pictures.

The Court:
Well, I will admit one picture, but not two pictures.

Mr. Mozingo:
All right, sir.

The Court:
I rule out that group picture. There is no objection to that, is there, Gentlemen?

Mr. Pedrick:
No, sir.

Note: Whereupon the pictures admitted in evidence were marked as Plaintiffs' Exhibit Nos. 4, 5 and 6.

Mr. Mozingo:
We rest.

The Court:
All right, you may proceed for the defendant.

Mr. Pedrick:
We have a motion we would like to make at this time, if Your Honor please.

The Court:
All right.

Mr. Pedrick:
The Plaintiffs have rested their cases and I want it understood that the motion I am going to make applies in each one of the three cases.

The Court:
All right.

Mr. Pedrick:

We move the Court for a directed verdict in favor of the defendant in each of the three cases. First, upon the grounds that from the evidence of the plaintiffs themselves it is shown that the defendant company was guilty of no negligence, the result of which caused the death of the son of either of the plaintiffs. Second, because the evidence introduced by the plaintiffs conclusively shows that the proximate cause of the death of the three deceased men was the negligence, first, of the driver of the automobile in driving the automobile into the side of the 82 or 83rd car from the engine of a 92 car train passing over this crossing, and therefore under neither theory can the plaintiffs recover, either upon the negligence of the defendant, which is negatived by the plaintiffs' own evidence, and they cannot recover because of the negligence of the driver of the automobile in driving the automobile into the side of the moving train.

The Court:

What do you say?

Mr. Mozingo:

We take the position that they are not entitled to a directed verdict because we say they were negligent and that we have made out a case. We have established that no fusees were thrown out on this crossing, no warning signals of any kind, and no precaution of any kind was taken by the railroad to prevent this accident, that there was an unusual circumstance surrounding the crossing in view of the fog and it was a dangerous crossing and so recognized as such.

The Court:
Well, I think it is a question of fact for the jury. I will overrule the motion.

Mr. Highsmith:
While we are here, there is a question going to be raised by this Section of the Code: In all actions against the railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury.

The Court:
Wasn't that law repealed.

Mr. Highsmith:
The first one was, but this one wasn't. The Presumption of Negligence. You agree that this one has not been repealed.

Mr. Pedrick:
I don't agree with your construction of it.

Mr. Highsmith:
This Act has not been declared unconstitutional. It was the old Act that was declared unconstitutional.

Mr. Pedrick:
I am not saying that it is unconstitutional.

Mr. Highsmith:
As we see it, it is just a question of the amount of the verdict. Don't you agree on that?

Mr. Pedrick:

No, sir. That is only a bona fide presumption which is done away with upon the introduction of any evidence to the contrary, whether it appears from the plaintiff's evidence or the defendant's evidence. The Supreme Court has held many times that it is error for the Court to mention it where there is evidence to the contrary, either upon the part of the plaintiff or the defendant, and we would except to Your Honor charging the presumptive statute. They have held time and time again—

The Court:

—I would say if there was no evidence at all he would be right.

Mr. Pedrick:

Well, his own witnesses negatives it.

The Court:

Well, I will overrule you on that. I can't follow you on that, Way.

Mr. Highsmith:

Well, their failure to put up witnesses who were called, and who were members of the crew, the presumption is that they would testify against them.

The Court:

I can't follow you on that.

Mr. Pedrick:

We have a right to stop anytime they do not make out a case

Mr. Highsmith:

We did not expect this, and we think it would be wise to take out and look up some law on it.

The Court:

No.

Mr. Highsmith:

The decisions have held, under the Code Section, which I have read, that upon proof of the killing of a person by the running of a train the burden shifts to the railroad company for them to prove that they exercised due care under the circumstances.

The Court:

Well, I have ruled on the first proposition. Anything else?

Mr. Highsmith:

The second proposition under the Georgia law is that a person who has testimony in his control to refute an allegation by the plaintiff and fails to produce the witness to refute the presumption arises that the allegation of negligence is true, that the witness would have confirmed what the plaintiff contends, that it would confirm the allegation of negligence.

Mr. Pedrick:

We are not bound to put up any evidence at anytime when we contend that the plaintiffs have utterly failed to make out a case. We have witnesses that we could put up, but we do not have to put them up when we say the plaintiffs have failed to make out a case.

Mr. Highsmith:

The Statute says that all we have to prove is the killing of the person by the running of the train and then the burden shifts to the defendant to show that it exercised due care and caution and was not guilty of any negligence.

Mr. Pedrick:

Why would I have to put up witnesses when we contend that they have not made out a case, and it certainly would be error for Your Honor to charge it.

The Court:

What's the next ground?

Mr. Highsmith:

The third ground is that their admissions did not comply with the Federal Rules in that they did not deny these things, but said they did not admit it. When they fail to deny it, they are presumed to have admitted it. They have admitted it.

The Court:

Did you introduce the admissions?

Mr. Highsmith:

They are filed in Court and it is a part of the record.

Mr. Pedrick:

And they read them to the jury, I filed a response and they read them to the jury as admissions on our part.

The Court:

You contend by their own admissions they have out a case.

Mr. Mozingo:

We take the position under the Rules that Mr. Pedrick did not swear to the admission. In numerous cases where they are not sworn to—

Mr. Pedrick:

They are sworn to.

Mr. Mozingo:

Not when they were served, but later swore to them and he did not deny them, and we take the position it is admitted and they were introduced in evidence and we say that under the Rules of Civil Procedure they are not allowed to deny them but are admitted for the purpose of the record. I think we have got a good case with or without them. As a matter of fact, we made out a case.

The Court:

You think—

Mr. Mozingo:

—The only thing is, Your Honor, the requests for admission were not sworn to at the time they were filed in the Clerk's office and were admitted. Mr. Pedrick later had some one to swear to them and they were read to the jury, and we say the effect of the language in it is not a specific denial and therefore they are admitted. The only thing I want to put in the record—well, that will be in the form of a request to charge about the witnesses.

Mr. Pedrick:

With reference to Mr. Mozingo's contention, first, that we did not swear to the Response to Request for

Admissions, I had sent them down here,—I did send them down here unsworn to. I could have amended them, but within the ten days I filed the response, sworn to, and in the required time they were filed according to the statute. In respect to his point there—I don't have it before me—he says that I had admitted it. I want to say this, that he has waived that when he read them to the jury as a part of his case. He says—

The Court:

But under the Rules where you do not admit the questions and you don't give a definite answer, it is admitted, isn't it?

Mr. Pedrick:

I don't think so.

Mr. Mozingo:

We contend that we have made out a case without resorting to it, as for that matter. We just say that it adds to it. We say we have made out a case anyway.

The Court:

Well, I am going to rule against your motions, all three of them. I am going to leave it up to the jury. I am going to overrule it. I am denying all of the plaintiffs' motions.

Mr. Mozingo:

Well, then, Your Honor, we would like to make a motion to reopen the case and offer the Coroner's Inquest. I don't know whether I have to offer it or whether the Court will take judicial cognizance, or judicial notice of it.

Mr. Pedrick:
It is not a Court record.

The Court:
I rule that out, too.

Mr. Mozingo:
Well, we would like to it. I know you have ruled it out, but I want to offer it.

Mr. Pedrick:
Well, I object to it. It is wholly irrelevant. It is not evidence of a Court record and the parties were not here available for cross examination. It is hearsay, as far as we are concerned, and offered after the case had been closed.

The Court:
I sustain the objection.

Mr. Mozingo:
Well, we offer the Coroner's Inquest in the case as admissions of their agents, as they were all sworn when Court began and were available to be put on the stand.

Note: At the conclusion of all the evidence and the foregoing motions and before the arguments by counsel to the jury had commenced the following motions and arguments were made.

The Court:
Now, I want to hear from you gentlemen on one thing. I don't think the plaintiffs have made out a case, unless the Code Section, which Mr. Highsmith

read yesterday, that after an injury of this kind the presumption then shifts to the railroad company. I want you to read me that Section again.

Mr. Highsmith:

It is Code Section Number 94-1108, if the Court pleases, and it reads this way: "In all actions against the railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

The Court:

Now, that's the Code Section that I have reference to. It says, in substance, as I understand it, that in the event of an accident or a collision, as have been in this case—well, read the rest of it.

Mr. Highsmith:

"—proof of injury shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury.

The Court:

Well, if that's the law today, I am going to let this case go to the jury, if it is not, I am going to direct a verdict for the defendant company.

Mr. Highsmith:

Well, it has been held constitutional by the United States Supreme Court.

The Court:
Well, it gets right down to that one issue. If that's the law as of today, that it raises a presumption against the railroad company then I think it is a question of fact for the jury, if not, I am going to direct a verdict for the defendant company. That's what I want to hear from you all on. That's the case as I see it. I have thought about this case quite a bit. Read that Section over to me again distinctly.

Mr. Highsmith:
"In all actions against the railroad company for damages done to persons or property, proof of injury inflicted"—

The Court:
—all right, you have proved there was an injury, that there was a death, all right.

Mr. Highsmith:
—"by the running of the locomotive of cars of such Companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

The Court:
All right, now, Mr. Pedrick, I want you to show me why that is not the law of the case. I don't want to hear further from you now, Mr. Highsmith. I will come back to you. I want you to show me, Mr. Pedrick, why that is not the law of the case.

Mr. Pedrick:
Well, if Your Honor please, there is a little history behind it.

The Court:

Well, I don't care about the history. I want to know why that is not the law of this case as of today.

Mr. Pedrick:

In order to understand this case, we must remember that we had an absolute presumption statute before this.

The Court:

I know that. I had a case like that to confront me in Augusta.

Mr. Pedrick:

That was the old 2780 that Your Honor use to know about.

The Court:

I know, because I had that case up in Augusta. Joe Cummings had a case like that up in Augusta, and it was declared unconstitutional.

Mr. Pedrick:

Yes, that was declared unconstitutional by the Courts. It was declared unconstitutional because our Courts had declared—or because our Courts had construed it so that when the presumption it—

The Court:

—it could not be rebutted? It was unrebuttable.

Mr. Pedrick:

It could be rebutted, but even if you proved it in any way at the beginning of the trial the presumption remained as a matter of evidence all the way through

the trial, and they said that was wrong, and that the only one that would stand up would be the old Mississippi Statute, I believe it was, that had only a prima facie presumption, that would vanish when there was any evidence to the contrary as to liability was introduced. Now, that was the factual back ground, and then—

The Court:
Now, read that to me again. I would like to hear it again. I don't think that's good law.

Mr. Pedrick:
I think Your Honor has hit the nail right on the head.

The Court:
I think both sides will agree with me that that's the proposition in the case.

Mr. Highsmith:
No, sir.

Mr. Pedrick:
"In all actions against the railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence"—Now, prima facie is not the old presumption that stayed through the trial—"prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

The Court:
Read that again now.

Mr. Pedrick:

The injury by the running of the locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury." Now, if Your Honor please, shortly after that was enacted the construction of that statute came up to one Supreme Court of Georgia, and in this case it happened that both the plaintiff and the defendant put in evidence, that is the only difference between the case I am referring to and the one at the bar.

The Court:

Well, that would be quite a difference, wouldn't it?

Mr. Pedrick:

Well, I will show Your Honor where it doesn't make any difference in just a moment. I can't get them all over at one time.

The Court:

Well, take all the time you want.

Mr. Pedrick:

The Supreme Court said, in the case of the Seaboard Vs Fountain, 173rd, Ga., Page 593—the trial Court charged that Section of the Code to the jury. The Supreme Court said the Court erred in giving in charge to the jury instructions based upon the Act of August 24, 1929. This act was taken to totidem verbis—

The Court:

—what does that mean?

Mr. edrick:
I don't know. I can't even pronounce it, Your Honor, but it means they just hold completely, lock, stock and barrel, is the way I always referred to it.

The Court:
Well, lets get down to the law.

Mr. Pedrick:
It was taken bodily from the statute of Mississippi on the subject. In construing the Mississippi statute the Supreme Court of that State held that it was intended to operate only when the facts were not or could not be produced in which event the burden was upon the company.

The Court:
Read that again, where it says "produce". Read that over again.

Mr. Pedrick:
In construing the Mississippi statute the Supreme Court of that State held that it was intended to operate only when the facts were not or could not be produced, in which event the burden was upon the company to prove the facts which are, as a general rule, peculiarly within its knowledge." Now, here, Your Honor, it is not a question of just finding a dead body.

The Court:
You said it was up to the defendant to do what? What did you say there? Read that again.

Mr. Pedrick:

—They held that it was to operate only when the facts were not or could not be produced.

The Court:

You mean that statute would be applicable when they did not or could not produce?

Mr. Pedrick:

That's right. When there is no evidence at all in which event the burden was upon the company to prove the facts which are, as a general rule, peculiarly within its knowledge; and that the principle of this statute should not be given in charge to the jury where the testimony in the case sufficiently explains every material fact connected with the infliction of the injury.

The Court:

That is where both sides introduced evidence.

Mr. Pedrick:

They did in this case, Your Honor. I want Your Honor to bear in mind that I can show you that that's not completely necessary. It can come just from the plaintiffs' evidence. I have got authority on that.

The Court:

Your understanding of that decision is what?

Mr. Pedrick:

Now, this is still the Supreme Court of Georgia: "The provision of this statute which makes proof of injury inflicted by the running of locomotives or cars of a railway company prima facie evidence of

the want of reasonable skill and care on the part of the servants of the company in reference to such injury casts upon the railway company the burden of the duty of producing some evidence to the contrary"—you don't have to rebut it lock, stock and barrel, but just some evidence—"and when that is done the inference is at an end". They call it an inference, not a presumption. It says that it is at an end when that is done, it stops.

The Court:
Where?

Mr. Pedrick:
When some evidence is produced.

The Court:
Where is your evidence?

Mr. Pedrick:
I can show you, if Your Honor please, that can come from the plaintiffs' evidence, and it did come from the plaintiffs' evidence.

The Court:
Is that in that decision there?

Mr. Pedrick:
Well, I have got others, but I wanted to show you how they construed this statute.

The Court:
All right.

Mr. Pedrick:

And when that is done, the inference is at an end, and the question of negligence is one for the jury from all the evidence. There is no presumption. In the case of Parish against the Western & Atlantic Railroad, 102nd Ga., Page 285—

The Court:

What year was that?

Mr. Pedrick:

That was back in 1897.

The Court:

Wasn't that the old law?

Mr. Pedrick:

I understand, but law principles don't change, if Your Honor please.

The Court:

They held that law there unconstitutional.

Mr. Pedrick:

No, sir. They held this, that when the burden was on the railroad company to rebut it throughout the trial, they held this: "It is also contended that, under our Code, when it is shown that a person is killed or injured by a railroad train, the law presumes that the company was negligent. This is true, and ordinarily it is incumbent upon the railroad company to show that it exercised all reasonable care at the time of the accident; but where the plaintiff's own evidence shows that he was guilty of gross negligence, the presumption against the company is rebutted or over-

come and the plaintiff cannot recover." Now, that's the plaintiff's own evidence.

The Court:
But that law has been declared unconstitutional, though.

Mr. Pedrick:
The principle of law is not. The way you rebut anything, if Your Honor please, is by evidence, whether it be by our evidence or the plaintiff's evidence. It makes no difference. It is before the Court.

Now, the same thing is held in the Southern Railway Company vs. Thompson, 129 Ga., Page 370. "If the presumption arises, it must be rebutted by evidence; but this may be done by evidence drawn from the plaintiff or his witnesses, as well as that introduced by the defendant."

The Court:
But you are using old law.

Mr. Pedrick:
It just happened that these I picked up hurriedly was under that. Now, I have got other decisions here. Do you want that?

The Court:
Get me some new ones under that new Section, which supersedes that old section, that's what I want.

Mr. Pedrick:
All the decisions, if Your Honor please, hold, that when there is any evidence to the contrary the inference vanishes. Now, in the 82. F (2) it doesn't say

plaintiff or defendant. It says in the 86 F. (2d), I am assuming that may be the Fifth Circuit because it is under the Georgia Code. Under Georgia statute providing that proof of injury inflicted by running of locomotive or railroad cars shall be prima facie evidence of railroad's want of reasonable care, when rebutted by evidence the presumption disappears from the case and the burden is on the plaintiff to prove negligence as alleged by clear preponderance of evidence.

The Court:

You haven't got any evidence in this case, though.

Mr. Pedrick:

Yes, but I can take the plaintiffs' own witnesses there and make a perfect case for the defendant, and that's what I have done. Now it would be error for Your Honor to charge it—

The Court:

—well, there is one or two things. I am either going to charge it or direct a verdict for you.

Mr. Pedrick:

It seems what is in Your Honor's mind is this: Your Honor is worrying about one thing, I believe, and that is in order for some evidence to the contrary to appear which would cause this inference to vanish that that evidence must come from the defendant.

The Court:

Didn't you say that ju[illegible] now?

Mr. Pedrick:

No, sir. I said that is not right, that wherever the evidence appears, and for instance, one of their own witnesses—

The Court:

—Whether it did or not, wouldn't that create another question of fact?

Mr. Pedrick:

But it is error, if Your Honor please. They have held that time after time, that it is error for the Court to charge that and let the jury have a prima facie presumption before it when the evidence already had caused that to vanish.

The Court:

Why couldn't I just make that provision in my charge?

Mr. Pedrick:

If you leave that to the jury, Your Honor, they will never know how to apply it. That is a question for the Court.

The Court:

Well, that is what is worrying me. I studied the case a good deal last night. Go ahead.

Mr. Pedrick:

Well, they have held many many times to that effect, and I can get numerous authorities where they have held that if there is any evidence to the contrary, that it doesn't have to come from the defendant

The Court:
I agree, but where is your evidence?

Mr. Pedrick:
Well, lets see about it. There was the witness, Rozier, that was on the stand.

The Court:
Was that the large stout man?

Mr. Pedrick:
Yes, sir, the Bible salesman. Now, he said that he was in a room in that Paradise Grill some 150 or 200 feet away from the railroad, that he was sitting at a counter and he was looking out a window, that he heard the train blow, he saw the train come by, saw the headlight of the train, and after the engine passed over the crossing he turned and looked out the door toward the crossing itself, and was looking at it and he saw the bulk of the car, the outline of cars moving across that crossing with his naked eye. He testified to that. And he said he didn't see any fusees, but he testified that his attention was—

The Court:
The law does not require them to have fusees, does it?

Mr. Pedrick:
I understand that, but here is the point, if Your Honor please, he saw the cars himself without any headlights shining in front of him. He saw them he said. Now, he said it was foggy but he did see them.

The Court:
But from an angle and—

Mr. Pedrick:
But he was looking at the crossing. They were going over the crossing. If he was able with his naked eye to see them then that would be some evidence to the contrary that a party coming along with a headlight, which is supposed to be properly focused and with proper power, evidence to the contrary that a person could not have seen that crossing because of the fog.

The Court:
But these boys were coming from a different angle than he was.

Mr. Pedrick:
Yes, but they put up young Moody next, a nephew of Mr. Rozier.

The Court:
The young boy?

Mr. Pedrick:
Yes. He didn't see the crossing until he heard the train and was conscious of it moving across the crossing and he heard the crash. He then looked out and saw the sparks there on the crossing. The significant part of his, though, that rebuts or is some evidence to the contrary, is that he was testifying to some grass growing along the edge of the highway of way here. the highway right-of-way, and he said when you are coming some distance from the crossing that your view to the right up the track is obscured, which is

irrelevant here, but when I asked him, "Robert," I think his name was—, "a party coming along there his view would be obstructed to a train coming from his right but with an obstruction on the crossing itself, would that have any effect? He said, "No, that would not have any effect, the crossing would be right out in front of him." Now, that is evidence, if Your Honor please, just as if they had been my witnesses and we had called them, just as if we had called the engineer or any other employee of the railroad and put them on the stand, and if the case for the defendant had been made out by their witnesses, would I still be charged with not having put up any evidence? Why put up evidence, if Your Honor pleases, if the evidence of the plaintiffs' themselves is sufficient?

The Court:

Well, I have got your idea. What was that provision, that if I charged that Code Section, that something else should be added to it? What was that? That that you were arguing just now. You said the Code Section did not speak the entire truth because of something else should have been added to it.

Mr. Pedrick:

I don't recall that, Your Honor.

The Court:

Well, I have got your idea, unless you want to say a few words, Mr. Bennett.

Mr. Bennett:

Your Honor, the only further observation that I would like to offer, Your Honor, is this; not only is the

direct testimony of the plaintiffs' witness, young Robert, to the effect that there was no obstruction of the view of an approaching car to a train which was actually on the crossing.

The Court:
Didn't he say something about a curve?

Mr. Pedrick:
Down the railroad. It didn't have anything to do with the highway.

Mr. Bennett:
He testified directly that in so far as a train or an engine actually on the crossing there was nothing to obstruct the view of a car approaching that crossing from the direction of Brunswick. We took the testimony of the two girls, I think one was taken by the plaintiff and the other one by the defendant, one was a neice of Mrs. Eberhardt, and in their testimony, by deposition, they brought out the fact that these boys had been out there that very night earlier crossing this crossing and going to a well and coming back, so they knew that the crossing was there, had there been no signs at all. In addition to that, the plaintiffs, although they have not introduced it in evidence, he has a model made here and has called three different witnesses to testify as to the condition of that crossing, and whether that was a true representation of the condition of that crossing and a fair model, which they said was a true representation of the crossing at the time, has both the cross buck sign and the so-called basket ball sign to warn cars approaching along the highway that they were approaching and were about to cross a railroad crossing. In addition

to what Mr. Pedrick has said, that is certainly a negative of the question of a want of notice that the crossing was there, which is an additional rebuttal of the presumption that the railroad was negligent.

The Court:

Do you all contend that if there is any evidence, no matter how small it is, that if there is any evidence to rebut it?

Mr. Pedrick:

Any evidence to the contrary is what the Supreme Court said, if Your Honor please. You don't have to decide whether it rebutted it or not, but any evidence to the contrary does away with any inference.

Mr. Bennett:

I might add this, if Your Honor please; in reference to the change in the law, I would just like to offer this observation that the present statute is much less drastic than the statute under which these first cases were decided. In other words, the presumption under those statutes was a presumption of law which had to be rebutted throughout the trial. They have held that this is merely a rule of evidence, which completely disappears upon the production of evidence to the contrary, whether that evidence comes from the plaintiffs' witnesses or the defendant's witnesses.

The Court:

Well, I think I have got your all's contentions. I want to hear from Mr. Highsmith now. Have you got any new decisions?

Mr. Highsmith:
I have got one case, Your Honor, decided in 1939, ten years after this law was passed.

The Court:
When?

Mr. Highsmith:
In 1939. It is in reference to the 1929 Act. It is a Court of Appeals case of Collier vs. Pollard. I may say that this is the first time since this Act has been passed, as far as the books show, where a railroad just introduced no evidence at all.

The Court:
All right, let me hear what it says. What is that?

Mr. Highsmith:
The Court of Appeals of Georgia, 60 Ga. App. Page 108. "Where damages are proved to have resulted by the operation of the cars of a railroad company, a presumption of negligence arises against the railroad company as to each of the negligent acts charged in the petition, and the plaintiff is entitled to recover the damages proved on such a prima facie case, unless the defendant shall carry the burden of showing that the damage was done by the consent of the injured person, or was caused by his negligence, or that the defendant was not actually guilty of the negligence charged, or, if so, the injured person could have avoided its consequences by the exercise of ordinary care after it had or should have become apparent." Of course, we have two guests in this case and there is no possibility of it applying to the guests. "Even if the negligence of the injured person con-

tributed in some degree of negligence less than that of the railroad, a recovery is still authorized in an amount diminished in proportion to such contributory negligence." They cite cases.

The Court:

Well, I don't think there is any question about that last part.

Mr. Highsmith:

Now, this is what I want you to listen to, Your Honor. "Of course, these defensive matters may appear from the plaintiffs' own evidence"—now, that is what he contends, but now listen:—"and if the plaintiff's evidence shows facts which would not authorize a recovery, a nonsuit would be proper. In this case (and it is the same as the case at bar) at least one act of negligence was not only not negatived by the plaintiff's evidence, but was proved."—and that is what we have in this case.

The Court:

Now, what have you all proved?

Mr. Highsmith:

We have proved, if the Court please, that it was a custom out there by the railroad to throw out fusees. The Fifth Circuit Court of Appeals hav just held about two months ago that it was negligence if the railroad had recognized it as an extra hazardous crossing, so that more warnings were necessary than the law required and had adopted a practice of throwing out fusees, and on that particular night they didn't throw out a fusee, or did throw out one that didn't burn, that that was negligence.

The Court:

Where is your evidence in this case that it was customary?

Mr. Rozier:

Mr. Rozier testified that they customarily threw out fusees when they passed that crossing and on that night they didn't do it, and the Fifth Circuit Court of Appeals, just two months ago, Judge Hutcheson writing the opinion and Judge Borah concurring, and Judge Holmes dissenting, that all they had to do was to show that the railroad had adopted a practice of recognizing this as a dangerous crossing and in that case they had all kind of signs down the highway admitting it.

The Court:

Let me see that decision.

Mr. Highsmith:

I have different things marked right under there, Your Honor. There is another case just like it, the Kidd case, decided about three months before that one. There just doesn't seem to be any question about the fact that the Fifth Circuit Court of Appeals holds —and that is right, of course, the law is undisputed that where a railroad recognizes that the crossing needs something more than a cross buck sign and doesn't put up a blinker, but instead of that throws out fusees to keep from putting up a blinker, and when they fail to do it, or throw out one that doesn't burn and somebody gets hurt, and it doesn't matter whether there is any fog or not.

The Court:

Here is what this ruling says: We think the rule invoked that recovery should be denied as a matter of law—if applicable here, whereas it is shown by the evidence of the defendant's witnesses that the defendant thought it would be necessary to put down lighted fusee as the train came into the crossing, but did not put the fusee on the side of the train which was struck by the car and neither is there evidence that the fusees were burning on the other side of the train at the time of the collision, that if it was burning would have been sufficient warning to those coming to the crossing on the opposite side. Now, that was a Texas case. Now, what does the Georgia law require?

Mr. Highsmith:

That was a Florida case, I think, If the Court will recall, that is the case which I cited in the Kamerrer case. It is just the same proposition. There just doesn't seem to be any doubt about the case. This was an extra hazardous crossing because of the embankment or because of the fog and undergrowth and many other things, and the railroad company recognizes it as such by putting out more warnings than the law requires and when they failed to do it it was an act of negligence.

The Court:

But the Circuit Court of Appeals reversed that Kammerer case twice, didn't they?

Mr. Highsmith:

No, sir, it was on the lawyers' opening statement mostly. They go further in this case, if Your Honor

please. It is very important. This is the only case I know of where this particular point has been made, of course the railroad introduced evidence in this case. They held that if every ground of negligence was disproved by the plaintiff's evidence then, of course, you can't recover, naturally, but it has got to be every ground. In this case, at least one act of negligence was not only not negatived by the plaintiffs' evidence—and we have about a half a dozen, the failure to have blinker lights, the failure to have gates there, and the failure to have fusees—we have about a dozen different grounds that they haven't negatived at all. Now, it says; It was not only not negatived by the plaintiff's evidence but was proved and their finding that there were others might or might not have been authorized. There was evidence that a speed ordinance was violated, constituting negligence per se. Where the plaintiff relies upon more than one act of negligence it is not necessary that he establish all the acts relied upon in order to be able to recover. In this state it cannot be said, as a matter of law, that the failure of a person, on approaching a railroad crossing, unaware of the approach of the train, to stop, look and listen, makes him guilty of a lack of ordinary care that would prevent a recovery.

The Court:
Let me see that.

Mr. Highsmith:
That is one case that seems to be a complete answer, if the Court pleases. I have two Fifth Circuit cases holding that familiarity with the crossing is no defense by the railroad.

The Court:

The headline says: There being no evidence to show what precaution the deceased took before going on the railroad crossing as to whether he discovered the negligence in time to avoid it by the exercise of ordinary care the Court should have submitted the questions involved to the jury for their determination. In other words, in this case there is certainly no evidence of the precaution the deceased took before going on the railroad crossing, or whether he discovered the negligence in time to avoid it by the exercise of ordinary care. There is no evidance here as to that. The Court says the Court should have submitted the questions involved to the jury for their determination. I think that covers it. I am going to let it go to the jury. I am not wholly free from doubt, but under that decision I think I will have to submit it to the jury. I have my doubts about it.

Mr. Highsmith:

I can assure the Court that there is no doubt about it.

The Court:

Well, I am not going by what you say. I am going by what I think the law is. I am forced to follow that decision there.

Mr. Highsmith:

Mr. Pedrick, if Your Honor please, on yesterday, interrogated our witnesses at great length about some pictures, whiih he held in his hand, and which he said he would state in his place were taken on that day and would prove that and would introduce them in evidence, and give us a chance to show that

they were not taken on that day, and if they were, the situation has been changed since they were taken. Now, he has closed his case without introducing those pictures and without making that proof, and the testimony was admitted on the conditions that he would connect it up and prove it and we ask the Court to exclude all that cross examination that has to do with those pictures upon the grounds that the pictures were never introduced in evidence and were not proved that they were made on that day.

The Court:

All right, I will hear from you about that, Mr. Pedrick.

Mr. Pedrick:

Why, if Your Honor pleases, I had the photographs identified, and I have a right to ask on cross examination and every bit of it was on cross examination as to what this picture showed and what it looked like and what it was, and that was all I did. Counsel—

The Court:

Well, you have got a right to change your mind. I changed my mind in this case. I had made up my mind this morning to direct a verdict for the defendant, but after I heard this decision I changed my mind. You have got a right to change your mind. I overrule the motion. You haven't suffered any harm by it.

Mr. Highsmith:

The plaintiff suffered harm by it, if the Court please.

The Court:
How?

Mr. Highsmith:
Because he undertook to have these witnesses to say that that was a picture of that crossing, taken on that day. There was not proof of that. We had proof that they weren't taken on that day. It was a picture of the crossing after they put up this new cross arm sign. It was never proved that that picture was taken before this thing occurred, or on the day it occurred, and all of that evidence is therefore irrelevant and immaterial and highly prejudicial to the plaintiffs.

The Court:
You want me to exclude all the testimony?

Mr. Highsmith:
We want the Court to exclude all the testimony that had to do with those pictures that he was holding in his hand because he took an unfair advantage of the witnesses and the plaintiffs. The witnesses did not know when it was taken. There was no proof offered as to when it was taken, and he was put on notice that we had three witnesses who would testify that it was not taken on the day that the accident happened, and he never put in that proof.

The Court:
What do you say to that, Mr. Pedrick?

Mr. Pedrick:
Your Honor, I have no recollection of being put on notice about any three witnesses.

Mr. Highsmith:
I didn't say three. I said witnesses.

Mr. Pedrick:
I certainly see no unfair advantage being taken of counsel there in examining witnesses with respect to photographs. They examined them on redirect about the same photographs as to whether they were made on that day or not, and it doesn't make any difference so far as most of that testimony because they said that it did represent their recollection of that crossing.

The Court:
I couldn't rule all of that evidence out.

Mr. Highsmith:
Now, if the Court please, we wish to make a motion for a directed verdict for each of the plaintiffs in these cases upon the grounds the evidence demands a verdict for each of the plaintiffs in some amount.

The Court:
For how much, a dollar?

Mr. Highsmith:
That's the motion, in some amount. Our position is that the evidence in this case, together with the law, the evidence and the law in this case, demands an instructed verdict for the plaintiff in each case and it is for the jury to determine the amount.

The Court:
That decision you gave me just now said that it was a question of fact for the jury. I am going to leave it to the jury.

Mr. Mozingo:

May it please the Court, I have just one further short motion, and I won't argue it. I would like for the record to show that when the trial began that the defendant had sworn Mr. Paul G. Waggoner, Mr. W. A. Britt, Mr. C. H. Mullins, Mr. W. A. Glass, Mr. C. B. Thompson and Mr. J. R. Tucker, who were all members of th crew of this train, except Mr. Waggoner, who was the policeman who investigated it. We would like for the record to show that they weren't sworn as their witnesses.

The Court:

Well, the record will so show. Just because they were subpoenaed doesn't mean that he has to introduce them.

Mr. Mozingo:

My purpose is to show that they had them available but did not use them.

The Court:

I will let it show in the record. Anything else, gentlemen?

Mr. Pedrick:

We have nothing else, Your Honor.

Mr. Highsmith:

The plaintiffs close.

• • • • • • • •

ORDER APPROVING TRANSCRIPT OF PROCEEDINGS.

Georgia,
Glynn County.

The foregoing 224 pages of typewritten matter are hereby approved as a true and correct transcript of the evidence and proceedings had in the cases of Mrs. Woodrow Sapp vs. Atlantic Coastline Railroad Company, Mrs. James H. Tyre vs. Atlantic Coast Line Railroad Company, and Mrs. Leroy Beckham, Sr., vs. Atlantic Coastline Railroad Company, being suits for damages in the United States District Court for the Southern District of Georgia, Brunswick Division, March Term, 1956.

Ordered, that same be filed as a part of the record in said case.

This 9th day of August, 1956.

(S.) F. M. SCARLETT,
Judge U. S. District Court.

Stipulation and Agreement by Counsel dated 10/5/56 for delineation and omission of Irrelevant matter as indicated; Omitted from the Printed Record, being heretofore copied at page 79.

• • • • • • • •

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

I, EUGENE F. EDWARDS, Clerk of the United States District Court in and for the Southern District of Georgia, do hereby certify that the foregoing is a true, correct and complete transcript of the record and proceedings had in this Court in Civil Action No. 292, wherein the Atlantic Coast Line Railroad Company is Defendant Appellant and Mrs. Woodrow Sapp is Plaintiff Appellee, and in Civil Action No. 293, wherein the Atlantic Coast Line Railroad Company is Defendant Appellant and Mrs. James H. Tyre is Plaintiff Appellee, And in Civil Action No. 294, wherein the Atlantic Coast Line Railroad Company is Defendant Appellant and Mrs. Leroy Beckham, Sr., is Appellee, each of said cases having been consolidated for trial, said Transcript containing all parts of the record and proceedings had in said causes, as directed by law to be made and as may be necessary upon the review of the cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court, at Brunswick, Georgia, this the 7th day of December, 1956.

EUGENE F. EDWARDS,
Clerk,
By MARY R. CROSS,
Deputy Clerk.

(Seal)

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No. 878

IN THE

United States Court of Appeals

FIFTH CIRCUIT.

No. 16,425.

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant*,

vs.

MRS. WOODROW SAPP, MRS. JAMES H. TYRE and MRS. LEROY BECKHAM, SR., *Appellees*

PETITION FOR REHEARING

U. S. COURT OF APPEALS
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Brunswick, Georgia,

J. P. MOZINGO, III,
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Attorneys for Apellees.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16425

ATLANTIC COAST LINE RAILROAD CO., *Appellant*

v.

MRS. WOODROW SAPP, MRS. JAMES H. TYRE, MRS. LEROY BECKHAM, SR., *Appellees*

PETITION FOR REHEARING BY APPELLEES

To The Honorable, The Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

COME NOW, Appellees in the above-entitled cause and respectfully ask for a rehearing in these three cases upon the following grounds, to wit:

Appellees, with the very greatest respect, but, also, with the most sincere conviction as to the soundness of their position, contend that this Court in reversing and rendering judgment against them, overlooked the following facts, to wit:

1. The evidence in these cases presented an issue for the jury. Trial by jury is guaranteed under the Seventh Amendment to the Constitution of the United States. It

was error for this Court to usurp the province of the jury in these cases.

The Court states (p. 8 of Opinion) that Appellees adduced some evidence in support of the various acts of negligence "particularized" by Appellees against Appellant.

Appellant put up no evidence whatever.

In this situation, this Court overlooked the fact that it was for the jury to decide whether or not Appellees' evidence was sufficient to carry the burden of proof.

2. The Court overlooked the fact that even without the benefit of the prima facie statute, Appellees' evidence was sufficient to carry these cases to the jury under the law of Georgia as interpreted by this Court and by Georgia Courts in numerous decisions.

3. The Court overlooked the fact that under Georgia law the testimony adduced by Appellees with respect to the inherently dangerous nature of this crossing, with respect to weather conditions existing on the night of the accident, and with respect to the practical invisibility at night of the particular type of freight cars making up the train in question, imposed upon Appellant the duty of giving some warning to motorists of the presence of the train at this dangerous crossing, in addition to that afforded by the train itself. See *A.C.L.* v. *Kammerer*, 239 F. 2nd 115 and the numerous cases cited therein.

4. In holding that the Georgia prima facie rule did not apply because "the evidence introduced by Appellees rebutted the only charge of negligence upon which they relied," the Court overlooked the fact that the complaints set out 13 charges of negligence against Appellant (R. 14), and that only one of these charges (the one with respect to the X sign) was rebutted by Appellees' evidence.

The Court also overlooked the fact that there was no evidence whatever which rebutted the principal charge of negligence upon which Appellees relied, namely, that because of the inherently dangerous nature of this crossing at which many accidents had occurred and because of the practical invisibility at night of the particular type of cars which were moved over this track, the railroad, instead of installing expensive blinker lights at this rarely used crossing, had adopted the expedient of having the engineer and the fireman throw out fuses on the highway on each side of the crossing at night to warn motorists of the presence of the train across the highway; that the traveling public had become accustomed to rely upon these fuses and were entitled to rely upon them; that fuses were not thrown out on the night in question or, if they were, they had burned out before the 83rd car reached the crossing, and that this negligence on the part on the railroad was the approximate cause of the collision.

All of the evidence introduced tended to support this principal ground of negligence relied upon by Appellees and none of the evidence introduced rebutted it in any way.

5. This Court, in holding that the prima facie statute did not apply because Appellees "particularized" the grounds of negligence in their complaints and because some evidence was introduced in support of some of the grounds of negligence, overlooked the fact that no such interpretation as this has ever been put upon this statute, to our knowledge, either by Georgia Courts or by any other Court.

6. In holding that it was encumbent upon appellees to prove directly that it was impossible for the occupants of the automobile to see the train at the time the automobile approached the crossing, this Court overlooked the fact that all of the occupants of the automobile were instantly killed at the crossing and, therefore, could not

appear as witnesses. On the other hand, the occupants of the train were not injured. That is the usual situation in cases of this kind and that is the reason for the Georgia prima facie rule. Ga. Code 94-118.

7. The Court overlooked the fact that the only persons in life, who could testify as to visibility down the highway being travelled by the automobile at the time the train reached the crossing, were the members of the train crew, whose evidence was not produced by the railroad, as required by Georgia law. Ga. Code 38-119.

8. In referring to the testimony of the witness Rozier as proof that the driver of the automobile could have seen the train at a distance of 150 feet, the Court overlooked the following facts:

(a) Rozier was sitting off the highway and on the opposite side of the crossing from the automobile.

(b) He had the benefit of a very bright neon light burning over the building in which he was sitting; whereas this light shone in the eyes of the occupants of the car as they approached the crossing.

(c) Even with the aid of the light, Rozier, who had heard the train whistle and was looking for it, could not see the train plainly.

9. In giving probative value to the testimony of the undertaker about visibility at the crossing when he arrived there sometime after the accident, the court overlooked the fact that the crossing was lighted up by that time when the bodies and wreckage were being removed from the crossing; also, the fact that the fog was spotty, being very dense at some times and places and not so dense at others, as testified to by all the witnesses. These observations apply also to the references by the Court to the testimony of the witnesses Moody, Doran and Shell, relating to the fog.

10. In holding (p. 5 of Opinion) "that no warning need be given to a person of prudence of an object plainly visible within the range of the statutory headlight requirements" and (p. 6) that "to establish liability it was necessary for appellees to prove that the fog was of such density that it impaired the automobile driver's visibility to such an extent that he in the exercise of ordinary care for his own safety could not have seen the train on the crossing in sufficient time to avoid striking it", the Court overlooked the following facts:

(a) The most recent decisions by this Court and by the Georgia courts are precisely to the contrary of the above quoted holdings in the cases sub judice.

(b) Each of the three complaints alleged that the railroad was negligent in not giving additional warning because of the invisibility of the train on the crossing to motorists approaching the crossing from the south, at the time of the collision.

Not one single witness testified as to the visibility of the train to motorists approaching from the south either at the time, or near the time, of the collision.

Visibility from the north was an entirely different thing than visibility to motorists from the south, because of the large neon sign.

This ground of negligence was therefore not negatived by any witness and it was encumbent upon the railroad under Georgia law to come forward with its evidence in order to avoid the impact of the prima facie rule.

11. In holding that appellees lost the benefit of the prima facie rule by "particularizing" various acts of negligence on the part of the railroad company "and having adduced some evidence in support thereof, the case then stood as to burden of proof no differently from a case against a non-railroad defendant", this Court

overlooked the fact that under the well known *Erie* v. *Tompkins* rule, the Court is bound by the interpretation of Georgia statutes made by Georgia courts. No Georgia court, to our knowledge, has ever given this interpretation to the statute embodied in Georgia Code Section 94-1108.

On the contrary, Georgia courts have held, without exception, to our knowledge, that the statute requires the railroad to come forward with some evidence to rebut each act of negligence "particularized" by the plaintiff.

To hold that because the plaintiff adduces some evidence in support of some of the grounds of negligence "particularized", he thereby forfeits the benefit of the statute as to each of those grounds and as to every other group of negligence charged, is simply new law, we most respectfully submit, insofar as Georgia is concerned.

No Georgia court has ever so held, to our knowledge, and the Court cites no authority, Georgia or otherwise, for its holding.

To the best of our knowldege, the applicant railroad has taken no such position in the case sub judice.

12. In holding (Opinion, p. 8) that "the inference of the railroad's negligence was at an end when the evidence introduced by appellees rebutted the **only** charge of negligence upon which they relied", this Court inadvertently overlooked the following facts:

(a) Appellees relied upon **every** act of negligence set out in the complaints, as amended.

(b) The final enumeration of the grounds of negligence relied upon by appellees is to be found on pages 14, 15, 16, 17, 18 and 19 of the record. Amendment filed March 2, 1956.

Thirteen grounds of negligence were set out in this amendment.

The only one of these thirteen grounds of negligence which was "negatived" by appellees' evidence was ground (h) with respect to the "X" sign.

The principal grounds of negligence relied upon by appellees are to be found in sub-paragraphs (i), (j), (k), (l) and (m) (R. pp. 16, 17, 18, 19).

No evidence was adduced by the railroad to refute any of these grounds of negligence and none of them was negatived by any evidence of Appellees.

In the light of these indisputable facts, we ask, with the utmost respect, how can this Court say that Appellees relied upon only one charge of negligence and that it was rebutted by Appellees' evidence?

13. This Court, in discrediting the testimony of the witness Rozier (Opinion, p. 6) with respect to the custom and rule of the railroad to throw fuses on the highway at this particular crossing to warn motorists when the crossing was occupied by a train, overlooked the following facts:

(a) The Court, in holding that the fuses seen by Rozier may have been put out as a warning to "following" trains, overlooked the fact that common sense dictates that fuses thrown out for this purpose would not be thrown on a public highway.

(b) The Court, in holding that the fuses seen by Rozier may have been used in "switching" operations overlooked the fact that the pictures introduced in evidence show that the railroad at this point is a single track upon which it would have been impossible to carry out "switching" operations.

(c) The Court, in holding that the fuses seen by Rozier may have been put out by "standing" trains, overlooked

the fact that under this Court's own very recent (4/12/57) decision in the *Watkins Case* (243 Fed. 2d 171) the railroad's duty with respect to moving trains is the same as with respect to standing trains.

(d) The Court overlooked the fact that under our law it is for the jury, and not the Court, to evaluate testimony of this kind.

(e) The Court overlooked the fact that it would have been a very simple matter for the railroad to have produced evidence as to what its purpose was in throwing fuses on the highway at this crossing, instead of leaving the matter to conjecture by the jury and by this Court. **That the railroad's failure to do so should be condoned by this Court, instead of condemned, is one of the several mysteries in the Court's decision in these cases.**

14. One of the charges of negligence made by the Appellees in these cases (R. 16 sub-paragraph i) was that because of the notoriously dangerous nature of this crossing at night, in any and all conditions of weather, the railroad had promulgated a rule requiring its train crews to throw fuses upon the highway; that motorists had come to rely upon these fuses to warn them when the highway was blocked by a train at night; that the crew failed to throw out a fuse on the night in question or that if they did so the fuse was not burning when the 83rd car crossed the highway.

It is elementary that violation of a company safety rule is evidence of negligence.

It is also elementary, and common sense, that when a railroad decides that a crossing is so dangerous as to require gates, blinker lights, fuses or the like; then installs one or more of these devices; then the device fails to operate, after motorists have come to depend upon it, and injury results, the railroad is liable, even though it may not have been liable in a given case if it had not lulled the motorist into reliance upon the safety device.

In holding in these cases that Appellees' evidence negatived every charge of negligence, this Court completely overlooked this charge of negligence.

Knowing that the sworn testimony of the train crew at the Coroner's inquest sustained this charge of negligence, Appellees did not prepare to prove it conclusively by their own witnesses, since they knew that under Georgia law the railroad would have to put in the evidence of the members of the train crew.

The railroad took a chance and did not do so, because it knew that the verdicts would be much larger if it did.

We respectfully submit that this Court, in its impartial administration of justice should not reward the railroad for its strategy by giving it judgment.

15. This Court, in holding that these cases should be reversed and judgment rendered for defendant in spite of the jury verdict, overlooked the fact that this Court itself states (Opinion, p. 8) that Appellees "adduced some evidence in support" of the various acts of negligence Appellees "particularized".

In other words, this Court holds that although Appellees adduced some evidence in support of their charges of negligence and although defendant introduced no evidence whatever as to negligence by decedants, or as to care by defendant, nevertheless, justice under law requires that judgment be rendered for the railroad.

We respectfully submit that this Court momentarily and inadvertently confused the respective provinces of courts and juries under Anglo-Saxon jurisprudence.

16. In holding that Georgia Code Section 38-119 does not apply to the failure of the railroad to put in the evidence of the train crew because the railroad subpoenaed the members of the train crew and they appeared in court on the day the case was called and could have

been sworn as witnesses by Appellees, the Court overlooked the following facts:

(a) This Code Section requires that the EVIDENCE must be produced.

(b) Having called these witnesses and sworn them on the first day of trial as potential witnesses for the defendant, plaintiffs had the right to assume, particularly in view of the prima facie statute, that their evidence would be introduced. It was not until after plaintiffs had closed their case that the railroad announced that it would offer no testimony. It was then too late for plaintiffs to call them as their own witnesses, even if they thought it necessary to do so.

(c) In important cases of this kind involving the deaths of three young men, the railroad should be required to put in the evidence of the train crew and this Court should certainly do no more than remand the cases for a new trial to determine what the evidence of the train crew is with respect to the grounds of negligence alleged against appellant.

WHEREFORE, for the reason stated, Petitions respectfully urge that the decision of the Court be revoked and the judgment below affirmed or, in the alternate, that a rehearing be granted Petitioners.

Respectfully submitted,

E. WAY HIGHSMITH,
Brunswick, Georgia,

J. P. MOZINGO, III,
Darlington, South Carolina,

J. H. HIGHSMITH,
Baxley, Georgia,

W. L. MCGOVERN,
Washington, D. C.

Attorneys for Petitioners.

We, the undersigned, attorneys for Appellees in the above-stated case, hereby certify that the foregoing petition for rehearing is not interposed for delay, and that in our judgment it is well founded and should be granted by this Honorable Court. This November 29, 1957.

E. Way Highsmith
J. P. Mozingo, III
J. H. Highsmith
W. L. McGovern

Certificate of Service

I hereby certify that I have this day mailed a copy of the foregoing petition to Honorable Larry E. Pedrick, Sr., Attorney at Law, Waycross, Georgia, and to Honorable L. J. Bennet, Attorney at Law, Brunswick, Georgia, Attorneys of Record for Appellant. This November 29, 1957.

W. L. McGovern
Attorney for Appellees.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 878

MRS. WOODROW SAPP, MRS. JAMES H. TYRE AND MRS. LEROY BECKHAM, SR., PETITIONERS,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY HAMMER,
Columbia, S. C.,
HENRY H. EDENS,
Columbia, S. C.,
E. WAY HIGHSMITH,
Brunswick, Ga.,
JAMES P. MOZINGO III,
Darlington, S. C.,
Attorneys for Petitioners.

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JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1957 (App. 22). Petition for rehearing (App. 23) was denied on December 24, 1957 (App. 42). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Does a federal appellate court have the power to review and weigh the evidence, and find the ultimate facts different than those found by the jury on the issue of an alleged particular of a railroad company's negligence where under the applicable substantive law of the state such particular of negligence, in the absence of some evidence to the contrary, is prima facie presumed, and no controverting evidence pertaining to such particular of negligence had been produced?

2. Apart from the statutory presumption, is it a question for a jury to decide whether or not a railroad company is negligent in slowly moving on a dark night a long freight train of low, black colored, non-illuminated flat cars over its tracks which cross at an obtuse angle a traveled highway blending in color with the freight cars in a foggy area, without giving the warning of placing lighted fusees at the unlighted crossing which it customarily gives on such occasions, or giving any other warning or signal of the presence of the train on the tracks to the traveling public whose view of the crossing is obstructed by an embankment, brush and trees, and whose vision is obscured by the bright neon lights on a building 150 feet beyond the crossing, where the railroad company was aware of such conditions creating a liklihood that motorists would collide with the passing freight train just as in fact did occur?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

Georgia Code Section 94-1108:

"In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

Georgia Code Section 38-119:

"Where a party has evidence in his power and within his reach, by which he may repel a charge or claim against him, and omits to produce it, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted."

STATEMENT

The instant cases, three in number and consolidated for trial and on appeal, were brought by petitioners, the mothers of three boys killed in a railroad crossing collision, against respondent, Atlantic Coast Line Railroad Company, for negligence in the operation of its train and maintenance of its railroad crossing proximately resulting in the collision between the automobile in which the intestates were riding and the 83rd car of a 92 car freight train of respondent while it was slowly moving over the crossing on a dark, foggy night without any lights or other warning to motorists of the presence of the train on the crossing,

although the respondent was aware of conditions which created a liklihood that motorists and its train would collide at the crossing just as in fact occurred. The deceased son of petitioner Mrs. Leroy Beckham, Sr., was driving the automobile and the sons of the other two petitioners were riding as passengers.

The jury returned verdicts of $34,000.00 in favor of petitioner Mrs. Woodrow Sapp, $34,000.00 in favor of petitioner Mrs. James H. Tyre and $40,000.00 in favor of petitioner Mrs. Leroy Beckham, Sr.

Upon appeal, the Court below reversed the judgments and remanded the cases to the District Court with directions to enter judgments for the respondent railroad company. Petition for rehearing (App. 23) was filed by the petitioners and denied by the Court below on December 24, 1957.

REASONS FOR GRANTING THE WRIT

1. **The decision herein is contrary to the applicable state law and violates the principle enunciated by this Court in** *Erie Railroad Co. v. Tompkins*, 304 U. S. 64: The decision in the Court below is in direct conflict with the holding by this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 78, that in a diversity case the federal courts are bound by the substantive law of the state as declared by the legislature or by the highest court of the state.

By the statutory law of Georgia, where the petitioners' sons met their untimely deaths, it is declared that in all actions against railroads for damages arising out of crossing collisions, proof of the happening of the event and the resulting injuries raises a prima facie presumption of negligence on the part of the railroad company, Georgia Code Section 94-1108. This presumption exists in favor of plaintiffs only as to railroads and does not apply against defendants in general.

The Georgia Court of Appeals in *Collier v. Pollard,* 60 Ga. App. 105, 2 S. E. (2d) 821, 823, has construed this statute to mean that "where damages are proved to have resulted by the operation of the cars of a railroad company, a presumption of negligence arises **as to each of the negligent acts charged in the petition,** and the plaintiff is entitled to recover the damages proved on such a prima facie case, unless the defendant shall carry the burden of showing that the damage was done by the consent of the injured person, or was caused by his negligence, or that the defendant was not guilty of the negligence charged."

And in *Atlantic Coast Line Railroad Co. v. Thomas,* 83 Ga. App. 477, 64 S. E. (2d) 301, the Georgia Court of Appeals stated, "In making out a prima facie case by evidence as to the various acts of alleged negligence he forces the railroad to produce **some** evidence **as to each alleged act of negligence** in order to avoid the effect of the prima facie case. When the railroad offers opposing evidence **as to each act of alleged negligence,** the statutory presumption immediately vanishes and plaintiff must go forward with the evidence if any more is needed to establish a preponderance of evidence."

It is also well settled law of Georgia that "where the plaintiff relies upon more than one act of negligence, it is not necessary that he establish all the acts relied upon in order to be able to recover." *Collier v. Pollard, supra.* And in this connection, the Georgia Court of Appeals, in applying the prima facie statute in *Collier v. Pollard, supra,* significantly stated: "In this case at least one act of negligence was not only not negatived by the plaintiffs' evidence but was proved, and a finding that there were others might or might not have been authorized."

The petitioners enumerated thirteen particulars of acts of negligence in the complaint (R. 13-19) designated by

letters (a) through (m). The only particular of negligence which was controverted was the allegation of paragraph (h) which alleged that the respondent railroad company was negligent in failing to erect a cross buck or "X" sign in accordance with the statute. Admittedly, the prima facie presumption of negligence as to this particular vanished in accordance with the Georgia law.

No controverting evidence was produced, however, as to the other alleged particulars of negligence, including particularly, *inter alia*, the allegations of paragraph (d) that the movement of the train over the crossing without giving warning to vehicular traffic was in violation of the railroad company's rules and regulations, and the allegations of paragraph (i) that the crossing was a dangerous one because of the prevailing conditions thereat; that the railroad company was aware of the conditions which created a liklihood that motorists would be injured by colliding with trains on the crossing; and that although in the past the railroad company had made reasonable provision against such liklihood and the public had come to rely upon such provision taken by the railroad to light up the crossing with fusees to warn them of the presence of freight cars on the tracks, no such provision was taken by the railroad on the night in question.

Notwithstanding the absence of controverting evidence on one or more of the particulars of negligence, the Court below, on the basis of the controverting evidence pertaining to the single particular of negligence of the railroad in failing to erect a cross buck sign, held that the prima facie evidence statute, Georgia Code Section 94-1108, did not create any presumption or "inference of negligence which warranted submitting the case to the jury." Clearly, such ruling was contrary to and violated the provisions of the Georgia prima facie evidence statute as declared by the legislature and construed by the highest court of the state.

The Court below also held that the Georgia prima facie statute did not apply in the instant case for the reason stated in its opinion that "appellees particularized various acts of negligence on the part of the railroad and having adduced some evidence in support thereof the case then stood as to burden of proof no differently from a case against a non-railroad". This ruling was in direct conflict with the Georgia decisions, all-of which hold that the prima facie statute applies notwithstanding the introduction of evidence in support, as distinguished from contradiction, of plaintiff's claim, *Collier v. Pollard,* 60 Ga. App. 105, 2 S. E. (2d) 821; *Fowler v. W. & A. Ry.*, 75 Ga. App. 156, 42 S. E. (2d) 499; *Gammage v. Atlanta and West Point Ry. Co.*, 97 Ga. 62, 25 S. E. 207; *Gay v. Sylvania Central Ry. Co.*, 79 Ga. App. 362, 53 S. E. (2d) 713.

Of course, the decision of the Court below against petitioner Mrs. Leroy Beckham, Sr., could not have been predicated upon contributory negligence of her son in the operation of the automobile. As was so aptly stated by the Georgia Court of Appeals in *Collier v. Pollard, supra,* "There being no evidence to show what precautions the deceased took before going on the crossing, or as to whether he discovered the negligence of the defendant in time to avoid it, or that he could have avoided it by the exercise of ordinary care, the Court should have submitted the question involved to a jury for determination", and "In the absence of evidence to the contrary, it is presumed that he complied with any duty that may have devolved upon him in that regard."

Moreover, under the Georgia law, "even if the negligence of the injured person contributed in some degree of negligence less than that of the railroad, a recovery is still authorized in an amount diminished in proportion to such contributory negligence." *Collier v. Pollard, supra.*

For the same reasons applicable to the petitioner Mrs. Beckham, a directed verdict against the other petitioners could not have been authorized. In addition, since the intestates of the other two petitioners were passengers in the automobile and there was no evidence of joint enterprise, the negligence, if any, of the driver of the automobile could not be imputed to the passengers, *Atlantic Greyhound Corporation v. Loudermilk*, 110 F. (2d) 596, nor can the concurring negligence, if any, of the driver of the automobile relieve the railroad company from liability for an injury resulting from the joint and concurrent negligence of the railroad and the driver of the automobile, *A. C. L. v. Freeman*, 193, F. (2d) 217, 219.

Thus, the action of the Court below in not applying the substantive law of the state, which includes matters pertaining to presumptions and burden of proof, *Cities Service Oil v. Dunlap*, 308 U. S. 208, clearly violated the doctrine of *Erie Railroad v. Tompkins*, 304 U. S. 64.

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution:** The decision of the Court below is concluding that the respondent railroad company was not negligent deprives the petitioners of their right to trial by jury under the Seventh Amendment to the United States Constitution. In its undue invasion of petitioners' constitutional rights, the decision of the Court below is in conflict with numerous decisions of this Court establishing the jury as the sole arbiter of disputed issues of fact.

That an appellate court is confined to an examination of the record merely to determine whether there was sufficient evidence to warrant submitting the issue to the jury in cases where the evidence is conflicting and subject to different inferences and conclusions, has long been the es-

tablished rule of judicial review; and the deprivation of a constitutional right by the violation of this fundamental rule has many times been made the basis for granting writs of certiorari by this Court. *Weade v. Dickman*, 337 U. S. 801; *Fountain v. Wilson*, 336 U. S. 681; *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500; *Smalls v. Atlantic Coast Line Railroad Co.*, 348 U. S. 946; *Neese v. Southern Railway Co.*, 348 U. S. 950; *Moore v. Chesapeake and Ohio Railroad Co.*, 340 U. S. 573; *Carter v. Atlanta and St. Andrews Bay R. R. Co.*, 338 U. S. 430; *Wilkerson v. McCarty*, 336 U. S. 53; *Myers v. Reading*, 331 U. S. 447; *Ellis v. Union Pacific R. R. Co.*, 329 U. S. 649; *Lavender v. Kurn*, 327 U. S. 645; *Jesionowski v. Boston and Main R. R. Company*, 329 U. S. 452; *Tenant v. Peoria and Perkin Union R. R. Co.*, 321 U. S. 29; *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620; *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350; *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54.

Apart from the prima facie presumption of negligence under the Georgia statute, the evidence of record shows, as correctly stated by the Court below, that petitioners "particularized various acts of negligence on the part of the railroad and • • • adduced some evidence in support thereof." The evidence adduced showed that "it was very foggy on the road that night", "the road was wet from the fog", "it was just foggy all over" including the railroad crossing, and it was "real, real bad that night". (R. 177); that immediately after the noise of the collision, one of the witnesses in a building approximately 150 feet from the crossing looked out of the window, but because of darkness, fog, and the nature and color of the feight cars blending with the black pavement (R. 105), could see only the sparks on the crossing caused by the car which was struck scraping along the tracks, but could not see any of the cars going over the crossing (R. 143, 144); that the crossing

was not permanently lighted, did not have any gates or automatic blinkers and there was no flagman at the crossing to warn motorists of the presence on the tracks of the train invisible or obscured to mortorists because of the surrounding conditions (R. 101); that the railroad company had in the past lighted up the crossing when moving its freight trains over it at night by throwing out fusees (R. 104) because of which, motorists had a right to rely that such warning would be given them of the presence of the freight cars on the tracks; that the view of the crossing looking toward the direction the automobile was travelling, was obscured, as stated in the opinion of the Court below, "by an embankment, deep underbrush, and trees"; that approximately 150 feet beyond the crossing, facing toward the direction of the approaching automobile in which intestates were riding, there was a building with large bright neon lights (R. 112) tending to further obscure the vision of motorists approaching the crossing; that despite the existence of such conditions, no fusees were used to light up the crossing and warn motorists of the presence of the unlighted freight cars on the crossing on the night in question (R. 104); and, that no official of the company was produced to repel the charge against it that a rule or regulation had been promulgated by the company, which had been violated, and no one was produced as a witness to repel the other charges against it, although its train crew was present in court and the Georgia Code, Section 38-119 provides that under such circumstances a rebutable presumption arises that the charges are well founded.

From the foregoing evidence of record, it is obvious that the crossing was a dangerous place for motorists passing over it and the presence of trains on the tracks would not be readily visible to motorists approaching the crossing, particularly under the conditions existing on the night in question and because of the fact that on previous occasions

it had been the practice for the railroad to light the crossing with fusees to warn motorists of the presence of freight cars on the track—a warning signal upon which motorists had the right to rely. The evidence is also clear that the respondent railroad company was aware of the foregoing circumstances or conditions. Under the foregoing facts, despite conflicting testimony as to some of the details, whether the railroad was negligent in discharging its duty to the public to maintain a visible crossing and provide proper warnings of the presence of trains on the crossing for the safety of motorists is a question to be determined by a jury under both the State and Federal law, *Atlanta and St. Andrews Bay R. R. Co. v. Church* (C. A. 5), 212 F. (2d) 688; *Atlantic Coast Line R. R. Co. v. Kammerer* (C. A. 5), 205 F. (2d) 525. The Georgia state court decisions holding that such facts create jury issues are collected in footnote 2 of the *Atlantic Coast Line R. R. Co. v. Kammerer case,* at page 119. The questions of whether the danger to motorists was foreseeable and whether the railroad had a duty to make reasonable provisions against it, were certainly for the jury. This Court so held in cases factually similar, *Smalls v. Atlantic Coast Line Railroad Company,* 350 U. S. 439; *Lillie v. Thompson,* 332 U. S. 459.

Therefore, it is respectfully submitted that the Court below, in substituting its view of the case for the jury, invaded the province of the jury, contrary to the rights of petitioners under the Seventh Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted, the judgment of the Court below should be reversed, and the judgments of the District Court should be affirmed and reinstated.

Respectfully submitted,

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APPENDIX

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JUDGMENT OF DISTRICT COURT OVERRULING MOTION FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Filed August 15, 1956

Defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial in these three consolidated cases having been argued on August 6, 1956, same is hereby overruled and denied upon the following grounds, to-wit:

1. Defendant's principal argument is that there was no evidence of negligence on the part of defendant. There was evidence, however, that defendant had recognized the crossing involved in this case as a particularly hazardous one on foggy nights by throwing out lighted fusees on such nights to warn vehicular traffic of the presence of railway cars on the tracks. There was evidence that on the night in question the crossing was engulfed in fog and the fusees were either not thrown out, or if they were, they were not burning at the time of the accident.

Although the defendant summoned to Court, and swore, all the members of the train crew, it did not use any of them as witnesses to contradict plaintiffs' evidence about the fusees, or for any other purpose. Defendant closed without offering any evidence.

Under Georgia law, "Where a party has evidence in his power and within his reach, by which he may repel a charge or claim against him, and omits to produce it—a presumption arises that the charge or claim is well founded; but this presumption may be rebutted." Ga. Code 38-119.

In the Fifth Circuit case of *Atlanta & St. Andrews Railway Co. v. Church*, 212 F. (2d) 688, 691, it was held that recovery may not be denied as a matter of law in a case in which, though the railroad thought it necessary to put down lighted fusees, it either put them out ineffectively or they went out before the accident.

2. Defendant contends that this was not a case in which Section 94-1108 of the Code of Georgia should have been given in charge to the jury. That section provides that "In

all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injuries."

This is a rebuttable presumption and Georgia Courts have uniformly held that it disappears immediately and the railroad goes forward with its proof of due care. When that occurs, the section should not be charged. *Atlantic Coast Line R. R. Co. v. Thomas,* 83 Ga. App. 477, 483, 64 S. E. (2d) 301.

But in the case at bar, the defendant railroad company, although having the witnesses at hand with which to disprove plaintiffs' contentions, if they were not true, with respect to the foggy night and the failure to put down fusees of sufficient burning length to last until the long string of cars passed the crossing, it did not choose to go forward with that proof, thus raising the presumption that the charge was well founded.

Defendant's contention is that the statutory prima facie rule was rebutted by plaintiffs' own witnesses, making it unnecessary for defendant to offer testimony in order to avoid the impact of the statute. But the contention is not borne out by the evidence. All of the evidence on the subject of fusees was to the effect that they were not burning at the time of the accident and that the night was foggy.

No other grounds of error were argued by the defendant upon the hearing.

In Chambers at Brunswick, Georgia, this August 14, 1956.

F. M. SCARLETT,
United States Judge.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16425

ATLANTIC COAST LINE RAILROAD COMPANY,
APPELLANT,

versus

MRS. WOODROW SAPP, MRS. JAMES H. TYRE AND MRS. LEROY BECKHAM, SR., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

(November 1, 1957.)

Before HUTCHESON, Chief Judge, and BORAH and CAMERON, Circuit Judges.

BORAH, Circuit Judge: These are appeals from adverse judgments entered upon jury verdicts in three separate actions brought by appellees to recover damages for the wrongful deaths of their respective sons, Leonard Holmes, Perman Tyre, and Leroy Beckham, Jr., which occurred when a 1950 Oldsmobile automobile in which they were riding was driven into a train of freight cars moving across Pyles Marsh Crossing between Brunswick and Jesup, Georgia.

In the complaints it was alleged, among other things, that defendant was guilty of wilful and wanton negligence in that it failed to provide a statutory cross arm sign or other observable sign or warning of the existence of the crossing, and did block the highway without throwing out lighted fusees in conformity with its alleged practice to so warn vehicular traffic of the presence of cars upon the crossing. Defendant denied each of these allegations of negligence and affirmatively pleaded that the negligence of the driver of the automobile and the two passengers in operat-

ing the vehicle at an excessive rate of speed and in failing to exercise ordinary care for their own safety was the sole and proximate cause of the collision.

The three cases were consolidated by the court below and a trial by jury was had. At the conclusion of plaintiffs' evidence, defendant moved for and was denied a directed verdict in each case. Whereupon, and after defendant elected not to produce its evidence, the court submitted the action to the jury. Upon return of the jury's verdicts for plaintiffs, defendant unsuccessfully moved for judgments *n. o. v.* or in the alternative for a new trial, and these appeals followed. The sole question confronting us for decision is whether the District Court erred in denying these motions.

The accident occurred shortly after midnight on the morning of October 26, 1951. At that time, and as they approached the crossing, the three minors, Holmes, Tyre and Beckham, all born and reared in Brunswick, were traveling in a northeasterly direction on U. S. Highway 25 from Brunswick toward Jesup, Georgia. Earlier in the evening, Beckham and Tyre in company with two young girls had driven out this highway to a point beyond Pyles Marsh Crossing and had returned over the same route. One of the girls who on this occasion had driven the automobile for a short period testified that it was in good running condition and that the brakes and headlights were functioning properly. Both girls testified that they encountered some fog on the road that night which they described variously as very foggy, spotty, or in patches, but one of these witnesses was not asked and the other did not recollect whether the weather conditions which they described existed at the crossing in question.

The defendant's track at Pyles Marsh Crossing runs in an east-west direction across Highway 25, and it was admitted by the railroad that it maintained no automatic signals or other warning lights at the crossing, and that no employee of defendant was stationed there to flag or otherwise warn motorists of the presence of defendant's train. However, the evidence, contrary to the allegations of the complaints, does show that an "X" or cross arm sign was

located on the Brunswick side of the crossing in conformity with applicable law. It also affirmatively appears that a motorist traveling toward Jesup on Highway 25 would, upon approaching the crossing, have his view from the east obstructed by an embankment, deep underbrush, and trees. But it is equally clear from the testimony that these physical conditions which existed on defendant's right of way would not prevent a motorist's seeing a moving freight train on the crossing directly in front of him and across the highway he was traveling.

The witness Robert W. Rozier, who operated a restaurant which was situated some 150 feet from the intersection of defendant's tracks and Highway 25, testified that he heard the train's warning whistle blow as it approached the crossing from the east. The witness stated that he was then seated in a lighted restaurant dining room looking through a plate glass window and although it was foggy outside he saw not only the approaching engine headlight, but also several of the dark colored freight cars—some high and some low or "gondola" types—as they passed over the crossing. He stated further that he had on prior occasions seen trains pass over the crossing, had seen them throw out fusees, but that he did not see a lighted fusee dropped from the engine on the night in question.

No eyewitness saw the automobile immediately before or when it crashed into the eighty-third car of defendant's ninety-two car freight train, but both Rozier and his twelve year old nephew, Robert Moody, heard the crash, saw sparks fly in the vicinity of the crossing, and a few moments later heard a loud explosion which illuminated the sky some fifty or sixty feet in the air. Following the explosion the train came to a stop. At that time the gondola car which had been struck and derailed by the automobile was a quarter of a mile west of the highway and the automobile was so enmeshed with the railroad car that it was necessary to use a torch to burn away some of the metal in order to remove two of the bodies from the wreckage. Rozier testified that there was some fog around the freight cars after the collision. But the undertaker who came to remove the bodies stated that he did not experience any difficulty because of

the weather in driving to the scene of the accident, and his testimony was corroborated by Moody who swore that the patches or streaks of fog which he and his aunt encountered on the road back to Brunswick after the accident was not so dense or hazardous that the automobile in which they rode had to be driven below normal speed.

On this appeal, appellant contends that plaintiffs' evidence wholly failed to show that the railroad company was guilty of any act of negligence the result of which caused the death of the son of either of the plaintiffs, and that under the facts the *prima facie* presumption statute, Georgia Code § 94-1108,[1] did not create any inference of negligence which warranted submitting the case to the jury. We agree.

We take it to be fundamental that when a railroad is permitted to be constructed, its operator may lawfully cross roads and streets with its trains just as members of the public may cross the tracks with their vehicles. *Driskell v. Powell*, 5 Cir., 67 F. (2d) 484. And it is the common sense rule in Georgia as elsewhere that no warning need be given to a person of prudence of an object plainly visible within the range of the statutory headlight requirements. *Atlantic Coast Line Railroad Company v. Kammerer*, 5 Cir., 239 F. (2d) 115, 117. In the instant case the only fact relied on by appellees to impose the additional duty on the part of the railroad to provide a special warning was the alleged presence of fog at the crossing. And to establish liability it was necessary for appellees to prove that the fog was of such density that it impaired the automobile driver's visibility to such an extent that he in the exercise of ordinary care for his own safety could not have seen the train on the crossing in sufficient time to avoid striking it. This they wholly failed to do. Rozier was the only witness who was conversant with the situation as it existed at or about the time of the collision and he from his position in a lighted room was able to see the moving cars go over the crossing at least 150 feet

[1] "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury." Ga. Code § 94-1108.

away without the help of any light shining before him as the occupants of the automobile doubtless had, or should have. Thus there was no evidence, either direct or circumstantial, which showed to what extent the visibility of the driver was impaired, which left the question of liability one of mere conjecture. *Atlantic Coast Line Railroad Company v. Marshall*, 89 Ga. App. 740, 81 S. E. (2d) 228.

With reference to the railroad's alleged custom of putting out fusees to warn motorists that a train was passing over the crossing, the one witness who testified that he had previously seen fusees burning at the crossing did not explain the conditions existing on those prior occasions. From all that appears the fusees may have been placed there while the train was standing on the crossing, during switching operations, or as a warning to following trains. But be this as it may, we are of the clear opinion that the evidence at the trial does not bring this case within the decision of this Court in the Florida case of *Atlanta and St. Andrews Railway Company v. Church*, 212 F. (2d) 688, 691, as appellees stoutly contend. Nor does Georgia Code § 38-119 supply the deficiency in appellees' proof. The statute provides that:

> "Where a party has evidence in his power and within his reach, by which he may repel a charge or claim against him, and omits to produce it, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted."

We think it plain from the Georgia decisions that the statute has no applicability here for the reason that such an inference cannot be drawn where the railroad crew was accounted for and produced in court where they could have been examined by appellees with reference to the alleged custom to protect this crossing with fusees. *Davis & Hatcher v. The Central Railroad*, 75 Ga. 645.

Likewise, and in agreement with appellant, we are of the opinion that the Georgia *prima facie* presumption statute, Georgia Code § 94-1108, does not aid appellees in making out a case. While it is true that a plaintiff may make out a *prima facie case* under this section by showing injury

by the running of a train and contending himself with the aid of the presumptive statute as to negligence on the part of the railroad through its servants,[2] that situation is not here presented. In the case at bar appellees particularized various facts of negligence on the part of the railroad and having adduced some evidence in support thereof the case then stood as to burden of proof no differently from a case against a non-railroad defendant. The burden rested upon appellees to establish their right to recover by a preponderance of the evidence. Conceding, as we must and do, the truth of all of the proof made by appellees, no imputation of negligence was cast upon the railroad for the statute only supplies an inference of liability "in the absence of other evidence contradicting such inference." *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35, 43. Here, the inference of the railroad's negligence was at an end when the evidence introduced by appellees rebutted the only charge of negligence upon which they relied.

Consequently, the matter was not for submission to the jury but should have been disposed of by the court by an instructed verdict. It was error to refuse to direct a verdict for appellant and because of that error, the judgment of the District Court is reversed and judgment is here rendered for appellant.

REVERSED AND RENDERED.

JUDGMENT

Extract from the Minutes of November 1, 1957

ATLANTIC COAST LINE RAILROAD COMPANY,

No. 16425 *versus*

MRS. WOODROW SAPP, MRS. JAMES H. TYRE, and MRS. LEROY BECKHAM, SR.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

[2] See *Atlantic Coast Line Railroad Company v. Thomas*, 83 Ga. App. 477, 64 S. E. (2d) 301, 318.

trict Court in this cause be, and the same is hereby, reversed and judgment is here rendered for appellant, Atlantic Coast Line Railroad Company;

It is further ordered and adjudged that the appellees, Mrs. Woodrow Sapp, Mrs. James H. Tyre and Mrs. Leroy Beckham, Sr., be condemned, *in solido*, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

PETITION FOR REHEARING AND BRIEF IN SUPPORT

To The Honorable, The Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Come now, Appellees in the above-entitled cause and respectfully ask for a rehearing in these three cases upon the following grounds, to wit:

Appellees, with the very greatest respect, but, also, with the most sincere conviction as to the soundness of their position, contend that this Court in reversing and rendering judgment against them, overlooked the following facts, to wit:

1. The evidence in these cases presented an issue for the jury. Trial by jury is guaranteed under the Seventh Amndment to the Constitution of the United States. It was error for this Court to usurp the province of the jury in these cases.

The Court states (p. 8 of Opinion) that Appellees adduced some evidence in support of the various acts of negligence "particularized" by Appellees against Appellant.

Appellant put up no evidence whatever.

In this situation, this Court overlooked the fact that it was for the jury to decide whether or not Appellees' evidence was sufficient to carry the burden of proof.

2. The Court overlooked the fact that even without the benefit of the *prima facie* statute, Appellees' evidence was sufficient to carry these cases to the jury under the law of Georgia as interpreted by this Court and by Georgia Courts in numerous decisions.

3. The Court overlooked the fact that under Georgia law the testimony adduced by Appellees with respect to the inherently dangerous nature of this crossing, with respect to weather conditions existing on the night of the accident, and with respect to the practical invisibility at night of the particular type of freight cars making up the train in question, imposed upon Appellant the duty of giving some warning to motorists of the presence of the train at this dangerous crossing, in addition to that afforded by the train itself. See *A. C. L. v. Kammerer*, 239 F. (2d) 115 and the numerous cases cited therein.

4. In holding that the Georgia *prima facie* rule did not apply because "the evidence introduced by Appellees rebutted the only charge of negligence upon which they relied," the Court overlooked the fact that the complaints set out 13 charges of negligence against Appellant (R. 14), and that only one of these charges (the one with respect to the X sign) was rebutted by Appellees' evidence.

The Court also overlooked the fact that there was no evidence whatever which rebutted the principal charge of negligence upon which Appellees relied, namely, that because of the inherently dangerous nature of this crossing at which many accidents had occurred and because of the practical invisibility at night of the particular type of cars which were moved over this track, the railroad, instead of installing expensive blinker lights at this rarely used crossing, had adopted the expedient of having the engineer and the fireman throw out fuses on the highway on each side of the crossing at night to warn motorists of the presence of the train across the highway; that the traveling public had become accustomed to rely upon these fuses and were entitled to rely upon them; that fuses were not thrown out on the night in question or, if they were, they had burned out before the 83rd car reached the crossing, and that this negligence on the part on the railroad was the approximate cause of the collision.

All of the evidence introduced tended to support this principal ground of negligence relied upon by Appellees and none of the evidence introduced rebutted it in any way.

5. This Court, in holding that the *prima facie* statute did not apply because Appellees "particularized" the grounds of negligence in their complaints and because some evidence was introduced in support of some of the grounds of negligence, overlooked the fact that no such interpretation as this has ever been put upon this statute, to our knowledge, either by Georgia Courts or by any other Court.

6. In holding that it was encumbent upon appellees to prove directly that it was impossible for the occupants of the automobile to see the train at the time the automobile approached the crossing, this Court overlooked the fact that all of the occupants of the automobile were instantly killed at the crossing and, therefore, could not appear as witnesses. On the other hand, the occupants of the train were not injured. That is the usual situation in cases of this kind and that is the reason for the Georgia *prima facie* rule. Ga. Code 94-118.

7. The Court overlooked the fact that the only persons in life, who could testify as to visibility down the highway being travelled by the automobile at the time the train reached the crossing, were the members of the train crew, whose evidence was not produced by the railroad, as required by Georgia law. Ga. Code 38-119.

8. In referring to the testimony of the witness Rozier as proof that the driver of the automobile could have seen the train at a distance of 150 feet, the Court overlooked the following facts:

(a) Rozier was sitting off the highway and on the opposite side of the crossing from the automobile.

(b) He had the benefit of a very bright neon light burning over the building in which he was sitting; whereas this light shone in the eyes of the occupants of the car as they approached the crossing.

(c) Even with the aid of the light, Rozier, who had heard the train whistle and was looking for it, could not see the train plainly.

9. In giving probative value to the testimony of the undertaker about visibility at the crossing when he arrived there some time after the accident, the court overlooked the fact that the crossing was lighted up by that time when the bodies and wreckage were being removed from the crossing; also, the fact that the fog was spotty, being very dense at some times and places and not so dense at others, as testified to by all the witnesses. These observations apply also to the references by the Court to the testimony of the witnesses Moody, Doran and Shell, relating to the fog.

10. In holding (p. 5 of Opinion) "that no warning need be given to a person of prudence of an object plainly visible within the range of the statutory headlight requirements" and (p. 6) that "to establish liability it was necessary for appellees to prove that the fog was of such density that it impaired the automobile driver's visibility to such an extent that he in the exercise of ordinary care for his own safety could not have seen the train on the crossing in sufficient time to avoid striking it", the Court overlooked the following facts:

(a) The most recent decisions by this Court and by the Georgia courts are precisely to the contrary of the above quoted holdings in the cases *sub judice*.

(b) Each of the three complaints alleged that the railroad was negligent in not giving additional warning because of the invisibility of the train on the crossing to motorists approaching the crossing from the south, at the time of the collision.

Not one single witness testified as to the visibility of the train to motorists approaching from the south either at the time, or near the time, of the collision.

Visibility from the north was an entirely different thing than visibility to motorists from the south, because of the large neon sign.

This ground of negligence was therefore not negatived by any witness and it was encumbent upon the railroad under Georgia law to come forward with its evidence in order to avoid the impact of the prima facie rule.

11. In holding that appellees lost the benefit of the *prima facie* rule by "particularizing" various acts of negligence on the part of the railroad company "and having adduced some evidence in support thereof, the case then stood as to burden of proof no differently from a case against a non-railroad defendant", this Court overlooked the fact that under the well known *Erie v. Tompkins* rule, the Court is bound by the interpretation of Georgia statutes made by Georgia courts. No Georgia court, to our knowledge, has ever given this interpretation to the statute embodied in Georgia Code Section 94-1108.

On the contrary, Georgia courts have held, without exception, to our knowledge, that the statute requires the railroad to come forward with some evidence to rebut each act of negligence "particularized" by the plaintiff.

To hold that because the plaintiff adduces some evidence in support of some of the grounds of negligence "particularized", he thereby forfeits the benefits of those grounds and as to every other group of negligence charged, is simply new law, we most respectfully submit, insofar as Georgia is concerned.

No Georgia court has ever so held, to our knowledge, and the Court cites no authority, Georgia or otherwise, for its holding.

To the best of our knowledge, the applicant railroad has taken no such position in the case *sub judice*.

12. In holding (Opinion, p. 8) that "the inference of the railroad's negligence was at an end when the evidence introduced by appellees rebutted the **only** charge of negligence upon which they relied", this Court inadvertently overlooked the following facts:

(a) Appellees relied upon **every** act of negligence set out in the complaints, as amended.

(b) The final enumeration of the grounds of negligence relied upon by appellees is to be found on pages 14, 15, 16, 17, 18 and 19 of the record. Amendment filed March 2, 1956.

Thirteen grounds of negligence were set out in this amendment.

The only one of these thirteen grounds of negligence which was "negatived" by appellees' evidence was ground (h) with respect to the "X" sign.

The principal grounds of negligence relied upon by appellees are to be found in sub-paragraphs (i), (j), (k), (l) and (m) (R. pp. 16, 17, 18, 19).

No evidence was adduced by the railroad to refute any of these grounds of negligence and none of them was negatived by any evidence of Appellees.

In the light of these indisputable facts, we ask, with the utmost respect, how can this Court say that Appellees relied upon only one charge of negligence and that it was rebutted by Appellees' evidence?

13. This Court, in discrediting the testimony of the witness Rozier (Opinion, p. 6) with respect to the custom and rule of the railroad to throw fuses on the highway at this particular crossing to warn motorists when the crossing was occupied by a train, overlooked the following facts:

(a) The Court, in holding that the fuses seen by Rozier may have been put out as a warning to "following" trains, overlooked the fact that common sense dictates that fuses thrown out for this purpose **would not be thrown on a public highway.**

(b) The Court, in holding that the fuses seen by Rozier may have been used in "switching" operations overlooked the fact that the pictures introduced in evidence show that the railroad at this point is a single track upon which it would have been impossible to carry out "switching" operations.

(c) The Court, in holding that the fuses seen by Rozier may have been put out by "standing" trains, overlooked the fact that under this Court's own very recent (4/12/57) decision in the *Watkins case* (243 Fed. (2d) 171) the railroad's duty with respect to moving trains is the same as with respect to standing trains.

(d) The Court overlooked the fact that under our law it is for the jury, and not the Court, to evaluate testimony of this kind.

(e) The Court overlooked the fact that it would have been a very simple matter for the railroad to have produced evidence as to what its purpose was in throwing fuses on the highway at this crossing, instead of leaving the matter to conjecture by the jury and by this Court. That the railroad's failure to do so should be condoned by this Court, instead of condemned, is one of the several mysteries in the Court's decision in these cases.

14. One of the charges of negligence made by the Appellees in these cases (R. 16 sub-paragraph i) was that because of the notoriously dangerous nature of this crossing at night, in any and all conditions of weather, the railroad had promulgated a rule requiring its train crews to throw fuses upon the highway; that motorists had come to rely upon these fuses to warn them when the highway was blocked by a train at night; that the crew failed to throw out a fuse on the night in question or that if they did so the fuse was not burning when the 83rd car crossed the highway.

It is elementary that violation of a company safety rule is evidence of negligence.

It is also elementary, and common sense, that when a railroad decides that a crossing is so dangerous as to require gates, blinker lights, fuses or the like; then installs one or more of these devices; then the device fails to operate, after motorists have come to depend upon it, and injury results, the railroad is liable, even though it may not have been liable in a given case if it had not lulled the motorist into reliance upon the safety device.

In holding in these cases that Appellees' evidence negatived every charge of negligence, this Court completely overlooked this charge of negligence.

Knowing that the sworn testimony of the train crew at the Coroner's inquest sustained this charge of negligence, Appellees did not prepare to prove it conclusively

by their own witnesses, since they knew that under Georgia law the railroad would have to put in the evidence of the members of the train crew.

The railroad took a chance and did not do so, because it knew that the verdicts would be much larger if it did.

We respectfully submit that this Court, in its impartial administration of justice should not reward the railroad for its strategy by giving it judgment.

15. This Court, in holding that these cases should be reversed and judgment rendered for defendant in spite of the jury verdict, overlooked the fact that this Court itself states (Opinion, p. 8) that Appellees "adduced some evidence in support" of the various acts of negligence Appellees "particularized".

In other words, this Court holds that although Appellees adduced some evidence in support of their charges of negligence and although defendant introduced no evidence whatever as to negligence by decedants, or as to care by defendant, nevertheless, justice under law requires that judgment be rendered for the railroad.

We respectfully submit that this Court momentarily and inadvertently confused the respective provinces of courts and juries under Anglo-Saxon jurisprudence.

16. In holding that Georgia Code Section 38-119 does not apply to the failure of the railroad to put in the evidence of the train crew because the railroad subpoenaed the members of the train crew and they appeared in court on the day the case was called and could have been sworn as witnesses by Appellees, the Court overlooked the following facts:

(a) This Code Section requires that the EVIDENCE must be produced.

(b) Having called these witnesses and sworn them on the first day of trial as potential witnesses for the defendant, plaintiffs had the right to assume, particularly in view of the *prima facie* statute, that their evidence would be introduced. It was not until after plaintiffs had closed their case that the railroad announced that it would offer no testimony. It was then too late for plaintiffs to call them as

their own witnesses, even if they thought it necessary to do so.

(c) In important cases of this kind involving the death of three young men, the railroad should be required to put in evidence of the train crew and this Court should certainly do no more than remand the cases for a new trial to determine what the evidence of the train crew is with respect to the grounds of negligence alleged against appellant.

WHEREFORE, for the reason stated, Petitions respectfully urge that the decision of the Court be revoked and the judgment below affirmed or, in the alternate, that a rehearing be granted Petitioners.

Respectfully submitted,

E. WAY HIGHSMITH,
Brunswick, Georgia,
J. P. MOZINGO III,
Darlington, South Carolina,
J. H. HIGHSMITH,
Baxley, Georgia,
W. L. McGOVERN,
Washington, D. C.,
Attorneys for Petitioners.

We, the undersigned, attorneys for Appellees in the above-stated case, hereby certify that the foregoing petition for rehearing is not interposed for delay, and that in our judgment it is well founded and should be granted by this Honorable Court. This November 29, 1957.

E. WAY HIGHSMITH,
J. P. MOZINGO III,
J. H. HIGHSMITH,
W. L. McGOVERN.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Division I. As to All Three Cases
Division II. As to Guest Cases Alone

DIVISION I

The decision of the Court in these cases is so startling in nature that we felt in duty bound, both to our clients and to the Court, to file a petition for rehearing.

The decision of the Court is based upon a statement of fact for which there is no support whatever in the record and upon a proposition of law which is unheard of in Georgia and for which Appellant does not even contend.

The Court states (Op. 8):

> "Here, the inference of the railroad's negligence was at an end when the evidence introduced by Appellees rebutted the only charge of negligence upon which they relied."

We challenge Appellant to point to one shred of evidence in the record which negatives Appellees' charge that the railroad had adopted a rule to protect this crossing at night with fusees and that this rule was violated on the night of the accident.

This Court holds (Op. 7) that the Georgia *prima facie* statute (94-1108) does not apply in the case at bar because "Appellees particularized various acts of negligence on the part of the railroad and having adduced some evidence in support thereof the case then stood as to burden of proof no differently from a case against a non-railroad defendant."

We challenge Appellant to cite a single decision so holding, and to show why the numerous Georgia decisions holding precisely to the contrary, three or four of which are cited in Appellant's own brief, should not be followed in the cases at bar.

There is simply no basis in fact or in law for this Court's holding on these two controlling points in the cases at bar, and if this Honorable Court will but read the Georgia cases and the portions of the record hereinafter cited,

we are confident that it will change its decision and affirm these cases.

1. Did Appellees rely upon only one charge of negligence and was that one charge negatived by Appellees' own evidence?

The record (p. 14) shows that each Appellee set out thirteen charges of negligence in her complaint as finally amended. The only one which was negatived by the evidence was the relatively unimportant one about the "X" sign.

These suits were brought and prosecuted primarily because the railroad's warning device failed on the night of Oct. 25, 1951. This Court held outright in the case of *Atlantic and St. Andrews Bay Railroad Co. v. Church*, 212 F. (2d) 688, that the failure of an identical type device (fusees) made a case for the jury, even **though the record in the Church case shows that plaintiff skidded 120 feet before running into the train.** This Court said in the *Church case* (pg. 691):

> "We think the rule invoked that recovery should be denied as a matter of law, is plainly inapplicable here, where, as is shown by the testimony of defendant's witnesses, **though the defendant though it necessary to put down the lighted fusee as the train came upon the crossing to stand there,** it did not put the fusee on the side of the train which was struck by the car; and neither is the evidence conclusive that the fusee on the other side of the train was burning at the time of the collision, nor that if it was burning, it would have given sufficient warning to those coming to the crossing from the opposite side."

In the cases at bar, one of the **principal** grounds of negligence relied upon by Appellees was: that the railroad "thought it necessary" (*Church case*) to put fusees on this highway at night at all times, fog or no fog, because of the inherently dangerous nature of the crossing and the type freight cars using it, and had adopted a rule requiring the train crews to do; that motorists had become accustomed to rely upon this warning, just as in the case of blinker lights; that the train crew, in violation of this rule, failed, on the

night of Oct. 25, 1951, to throw out a fusee on the highway, or if it did, the fusee burned out before the 83rd car reached the crossing.

Any finding that Appellees' evidence negatived this principal ground of negligence, is in error.

We expected to prove the existence of this rule conclusively by the train crew. When the crew was not put up we assumed that we would be protected by the *prima facie* statute, as all Georgia decisions hold.

There is not a word in the record to negative the existence of such a railroad rule.

Two of the judges who sat in the *Church case* (*supra*), sat in the cases at bar. **We have read the record in the Church case carefully.**

This Court's decision upsetting the jury's verdict in the cases at bar cannot be reconciled with its decision upholding the verdict in the *Church case* (*supra*).

The only plaintiff in the *Church case* was the representative of the driver of the car. He was drinking; there was liquor in the car. He skidded 120 feet into the train. Nevertheless, this Court (two judges being the same as in the cases *sub judice*) held that the failure of the railroad to put out fusees after recognizing the necessity for them, made a case for the jury.

Now the same Court holds, in the absence of any evidence whatever as to whether or not the driver did, in fact, see the train, that the failure of the railroad to put out fusees is immaterial.

The Court ignores completely the holding in its own Kammerer decision, 239 F. (2d) 115 (footnote pg. 119), that "One is not always required to drive so that he may stop within the range of his headlights," quoting from *Savannah and Atlanta Ry. Co. v. Newsome*, 90 Ga. App. 390, 83 S. E. (2d) 80, and citing *McDowall Transport, Inc., v. Gault*, 80 Ga. App. 445, 447, 56 S. E. (2d) 161.

To the same effect is the 1957 Georgia case of *Padgett v. Central of Ga. Ry. Co.*, 95 Ga. App. 96, 98, 96 S. E. (2d) 659, and others.

In the case of *Doby v. W. L. Florence Const. Co.*, 71 Ga. App. 888, 32 S. E. (2d) 527, the Court said:

> "With respect to the requirement that all motor vehicles must be equipped with lights capable of revealing an object 500 feet ahead, it is common knowledge that substantial objects, because of their composition or coloring, and the coloring of the surface or object upon which they rest, are visible in greatly varying degrees when artificial lights are thrown upon them **and are not necessarily visible.**"

2. Equally incomprehensible is this Court's seemingly contradictory holding that Appellees having "adduced some evidence in support" of their grounds of negligence (the Court just having said that plaintiff's evidence negatived the only ground of negligence upon which they relied), **"the case then stood as to burden of proof no differently from a case against a non-railroad defendant."**

The Court cites no authority for this holding. All Georgia authority is precisely to the contrary. Four cases cited by Appellant itself in its own brief hold precisely to the contrary. We simply cannot understand how this Court could so hold.

One of the cases cited by Appellant is the case of *Collier v. Pollard*, 60 Ga. App. 105, 2 S. E. (2d) 821, which is squarely in point. In that case plaintiff not only proved the injury, but offered some evidence as to the railroad's negligence, as in the cases at bar. The railroad offered no evidence. The trial court granted a nonsuit, holding plaintiff's evidence insufficient and the *prima facie* statute inapplicable, just as this Court has done. But the Court of Appeals reversed, holding that it was incumbent upon the railroad to come forward with its evidence **"as to each of the negligent acts charged in the petition"**.

Other cases cited by Appellant in its own brief which hold precisely contrary to this Court's holding, under similar facts, are:

Fowler v. W. & A. Ry., 75 Ga. App. 156, 42 S. E. (2d) 499. Grant of nonsuit reversed, where plaintiff introduced evidence, but railroad did not. *Prima facie* statute applied.

Gammage v. Atlanta and West Point Ry. Co., 97 Ga. 62, 25 S. E. 207. This is a case decided by the Supreme Court of Georgia in which the plaintiff introduced evidence, but the railroad did not. Grant of nonsuit reversed, because of the *prima facie* statute.

The case of *Gay v. Sylvania Central Ry. Co.*, 79 Ga. App. 362, 53 S. E. (2d) 713, is squarely in point. Plaintiff introduced evidence but the railroad did not. Grant of nonsuit reversed, holding *prima facie* statute applicable.

This Court is rewriting Georgia law in holding that if a plaintiff "particularizes" the grounds of negligence and introduces any "evidence in support thereof", he thereby loses the benefit of the *prima facie* statute.

We point out again that Appellant has not even made any such contention in the cases at bar. All Appellant has contended is that the evidence introduced by Plaintiffs negatived every ground of negligence set out in the complaints, as amended.

But, of course, that is not true, because there was no evidence introduced whatever which negatived one of the principal grounds of negligence relied upon, as set out above.

The Court's decision is, we respectfully submit, precisely contrary to the holding of the Supreme Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

3. Under this Court's own decision in the *Church case* (*supra*), failure of a railroad's warning device (fusee) to work makes a case for the jury, even though the driver of the automobile in that case actually saw the train for at least 120 feet before reaching the crossing.

Many other cases to the same effect could be cited. For example, see exhaustive annotation in 5 A. L. R. (2d) 112, **"Customary or statutory signal from train as measure of Railroad's duty as to warning at highway crossing."**

4. Violation of a company rule promulgated for the safety of the public is evidence of negligence. See *Central of Georgia Ry. Co. v. Shaw*, 46 Ga. App. 248, 167 S. E. 533.

5. Appellant may contend that the *ratio decidendi* of the Court's decision is that, (1) regardless of whether or not the railroad customarily protected this particular crossing at night with fusees, (2) regardless of whether or not motorists had become accustomed to be warned by fusees of the presence of a train across the highway, (3) regardless of whether or not fusees were burning at the time of this accident, nevertheless, regardless of all this, the evidence showed that if the driver of the automobile had been exercising ordinary care he could have seen the train in time to stop.

We pointed out in the petition for rehearing that the evidence did show that the train was "plainly visible" to the driver of the car and will not repeat what we said there in this brief.

But neither under the great weight of authority in Georgia nor under this Court's own prior decisions is it necessary to show that the obscuring cause is of such nature as to make visibility of the train absolutely impossible until too late to stop, in order to go to a jury, as this Court now holds.

Proof of some unusual condition is sufficient to go to a jury on the question of whether or not a duty devolved upon the railroad to give some additional warning than that afforded by the train itself, under the circumstances existing.

It is only in clear and absolutely indisputable cases, under Georgia law, that the case is withdrawn from the jury.

Surely this Court cannot hold that the evidence in these cases shows beyond dispute that the driver of the automobile could have seen the **flat, gondola type, freight** car, which he hit, in time to stop before hitting it.

All of the Georgia decisions and the recent decisions of this Court supporting these propositions have been so recently and so thoroughly analyzed by this Court in the *Kammerer case* (*supra*) in which two of the judges who decided the cases at bar took part in the decision, that we consider it unnecessary to elaborate further upon them in this brief.

Since the decision in the Kammerer case, this Court has applied the same principles of law to moving trains. *Texas and Pac. Ry. Co. v. Watkins*, 243 F. (2d) 171.

This Court cites *A. C. L. v. Marshall*, 89 Ga. App. 740, 81 S. E. (2d) 228, as authority for its holding on this point without pointing out as it did in the *Kammerer case* (footnote pg. 119) that the *Marshal case* was not followed by the same court in two subsequent cases arising out of the same accident, namely, *A. C. L. v. Clements*, 92 Ga. App. 451, 88 S. E. (2d) 809, and *A. C. L. v. Coxwell*, 93 Ga. App. 159, 91 S. E. (2d) 135.

As Judge Russell said in the well considered Georgia case of *A. C. L. v. Key*, 196 F. (2d) 64:

> "It is only in a rare case where the evidence demands a finding that the plaintiff was, or in the exercise of due care should have been, aware of the approaching train that further progress in crossing the track may in itself be held a bar to recovery. In all other instances, the question is one for the jury to determine under all the circumstances whether attempt to cross a track without stopping or looking or listening is a failure to observe ordinary care." (Cases cited.)

This Court held three times in the *Kammerer case* (*supra*) that whether or not an object is "plainly visible" to a motorist, when there is evidence of unusual conditions, is for a jury to decide.

It held the same thing in the *Bailey case. Texas-New Mexico Railway Co. v. Bailey*, 203 F. (2d) 647; also *A. C. L. v. Hadlock*, 180 F. (2d) 105; also in the *Pidd case*, 197 F. (2d) 153. Also *Church.* (*supra.*)

The Court in the last Kammerer decision cited with approval and quoted at length from the recent Georgia case of *Savannah and Atlanta Ry. Co. v. Newsome*, 90 Ga. App. 390, 83 S. E. (2d) 80, at page 83; which cites many of the other Georgia cases holding to the same effect. (Headnote pg. 119).

See extensive annotation in 42 A. L. R. (2d) page 13, Sections 18 and 49, *entitled "Liability for Motor Vehicle Accident Where Vision of Driver is Obscured By Smoke,*

Dust, Atmospheric Condition or Unclear Windshield" in which the leading Georgia cases are discussed.

As a close student of this Court's decisions in railroad crossing cases since the advent of the automobile era, and having read the records in many of these cases, the writer asserts that this Court has never before held, during this period, that a case such as this is not a case for a jury.

DIVISION II

Feeling certain that all three of these cases would have to be affirmed under Ga. Code Sections 94-1108 and 38-119 and under the principals of law so recently announced by this Court in the cases of *Kammerer, Watkins, Church, Bailey, Pidd* (all *supra*), and many others, we failed, in our brief, to call the Court's attention to the fact that under the facts involved here, two of the cases at bar, to wit, *Tyre v. A. C. L. and Sapp v. A. C. L.*, stand in a much more favorable position under the law of Georgia than does the third, *Beckham v. A. C. L.*

The Tyre boy and the Sapp boy were guest passengers in the Beckham car, the Beckham boy being the driver of the car, all as shown by the record.

We most earnestly contend that under this Court's own findings and holdings on these appeals, the verdicts in favor of Mrs. Tyre and in favor of Mrs. Sapp must be sustained, ever though the verdict in favor of Mrs. Beckham be reversed upon the following grounds, to wit:

1. This Court has held on these appeals that the evidence showed that the fog was not thick enough to prevent the driver of the car (Beckham) from seeing the freight train and that he was, therefore, negligent in not bringing his car to a stop before reaching the crossing.

2. This Court has also held on these appeals that the *prima facie* statute (Ga. Code 94-1108) is not applicable in any of the three cases because the plaintiffs "particularized" the railroad's acts of negligence and **adduced some evidence in support thereof.**" (Op. pg. 8).

3. It is elementary, of course, that the negligence of the driver of an automobile is not attributable to his guest

passengers. *Atlantic Greyhound Corp. v. Loudermilk*, 110 F. (2d) 596 (5).

4. There was no evidence of any independent negligence on the part of the guests, Tyre and Sapp.

5. This Court has therefore held, in effect, that the death of young Tyre and Sapp was the result of the joint and concurrent negligence of Beckham, the driver of the automobile, and the defendant, Atlantic Coast Line Railroad Company.

6. Nevertheless, this Court has reversed the judgment against one of these two joint tort feasors in favor of the mothers of the two guest passengers, even though the Court has heretofore held, in accordance with the great weight of authority in all jurisdictions, that full recovery may be had against one joint feasor, no matter how small the negligence of the sued joint feasor may have been when compared with the negligence of the unsued joint tort feasor; credit being given for any payments made by the unsued joint tort feasor, as was done in these cases. (See Charge of Court, Record page 57.)

The following is the holding of this Court in the case of *A. C. L. v. Freeman*, 193 F. (2d) 217 at page 219:

> **"Even if the collision was caused by the concurring negligence of the defendant and of the driver of the car, the defendant is liable for injuries to a non-negligent guest in the car to the same extent as though the damage had been caused by defendant's negligence alone. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can such wrongdoer escape liability for damage he has caused on the ground that the wrongful act of a third party contributed to the injury."**

7. There is still another important point which differentiates the *Tyre* and *Sapp cases* from the *Beckham case*. Each of these three cases was filed separately. The Court below required them to be tried together, however, because they arose out of the same accident, even though different legal principles were involved in the guest cases than in the driver's case. But separate evidence was introduced as to

each case and the Court charged the jury separately as to each case, all as shown by the record.

This Court has held that all of these plaintiffs lost the benefit of the prima facie statute because evidence was introduced to exonerate the driver of the car of negligence in one of the cases.

We respectfully submit that Appellees, Mrs. Tyre and Mrs. Sapp, should not be penalized because by order of the trial court the cases were consolidated for the purpose of trial. If the cases of Mrs. Tyre and Mrs. Sapp had been tried separately from that of Mrs. Becton, all that would have been done would have been to prove the death of their sons as the result of the collision with the freight train. The railroad, under this Court's decision, would then have been compelled to produce the evidence of the train crew, which we are confident would have made out a case of negligence against the railroad.

Surely, as to the cases of Mrs. Tyre and Mrs. Sapp, the prima facie statute was not rendered inapplicable because evidence was introduced to show, in support of the Becton case, (1) that the car was in good condition, (2) that the driver could not see the train because of the fog, and (3) that the railroad failed to warn him of the train's presence at the crossing.

As to the Tyre and Sapp cases, the only evidence introduced was with respect to the death of the two boys as the result of the collision with the train, the value of their lives and dependency.

As to them, the railroad was certainly required to put up the train crew as witnesses under the prima facie statute and its failure to do so, we respectfully contend, demands that the judgments in their favor be affirmed.

IN CONCLUSION

The Court will pardon this personal reference. One of the authors of this brief had the rare good fortune, as a law student thirty-five years ago, to have as his tutor, the late lamented Sir William Holdsworth of Oxford University, noted English jurist, author and professor of law. His

constant admonition to his pupils was "follow the argument wherever it leads" when judges hold against you upon grounds unfathomable to you.

We have tried to do that in these cases, but the mystery remains.

The most that can be said is that Appellees' attorneys failed to anticipate this Court's novel holding with respect to the Georgia *prima facie* statute and therefore failed to put in the testimony of the train crew with respect to the railroad's rule about putting out fusees.

There can be no question about the fact that the ruling is novel.

We respectfully submit that these cases should be affirmed, but that in any event, the most this Court should do is to send them back for a new trial under this new Georgia law promulgated by this Court.

Respectfully submitted,

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ORDER DENYING REHEARING

Extract from the Minutes of December 24, 1957

ATLANTIC COAST LINE RAILROAD COMPANY,

No. 16425 *versus*

MRS. WOODROW SAPP, MRS. JAMES H. TYRE, and MRS. LEROY BECKHAM, SR.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 878

Mrs. Woodrow Sapp, Mrs. James H. Tyre
and Mrs. Leroy Beckham, Sr.,
Petitioners,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM 1957

No. 878

Mrs. Woodrow Sapp, Mrs. James H. Tyre and Mrs. Leroy Beckham, Sr.,
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY SATEMENT OF QUESTIONS PRESENTED

The Petitioners seek access to this Court on the ground that under the evidence, when aided by the prima facie presumption statute of Georgia, the jury was authorized to find in their favor; and this Court is asked to review and weigh the evidence and render a decision contrary to the decisions of the Georgia courts and contrary to the decision of the Court of Appeals of the Fifth Circuit which was based upon the law clearly laid down by the Georgia Courts.

The sole and only real question is:

Have Petitioners clearly demonstrated that the Court of Appeals has decided an important question of Georgia law in conflict with the decisions of the Supreme Court of Georgia?

The petition should be denied because:

1. No reason is shown to justify this Court in granting certiorari.

2. The decision of the Court of Appeals was right.

ARGUMENT

1. No reason is shown to justify this Court in granting certiorari.

The Court of Appeals reviewed the entire evidence and applied the applicable Georgia statutes, as construed by the highest courts in that State.

This Court has emphatically stated to the bar that "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. **Johnston**, 268 U.S. 220, 227, 69 L. ed. 925, 926;

Houston Oil Company v. **Goodrich**, 245 U.S. 440, 62 L. ed. 385;

Southern Power Company v. **North Carolina Public Service Company**, 263 U.S. 508, 68 L. ed. 413;

General Talking Pictures v. **Western Electric Co.**, 304 U.S. 175, 178, 82 L. ed. 1273.

The only deviation from this practice has been in cases arising under the Federal Employers' Liability Act, where the Court has relaxed the rule apparently upon the theory that those cases involve the assertion of Federal rights governed by Federal law.

Schulz, Admrx. v. **Pennsylvania RR. Co.** (1956), 350 U.S. 523, 100 L. ed. 668 (1-2).

In cases arising under the Federal Employers' Liability Act this court has relaxed the rule with respect to inferences to be drawn from the evidence, and has held that the jury is the sole arbiter of disputed issues of fact. That is not the law of Georgia which governs this case.

This case does not involve a decision by a state court of a question arising under a federal statute, nor does it involve the assertion of a federal right governed by federal law.

Nor is this a case where a court of appeals has decided an important state question in conflict with applicable state law.

Nor is this a case which has decided an important question of federal law which has not been, but should be, settled by this Court, nor is it one that has decided a federal question in conflict with the applicable decisions of this Court.

It is merely a case where an automobile occupied by three young men was driven into the side of a train moving in a regular and ordinary manner over a highway crossing. The Court of Appeals decided that no legal proof of negligence was made against the railroad.

The petition does not measure up to the requirements of Rule 19 of this Court.

United States v. Rimer, 220 U.S. 547, 55 L. ed. 578;

Magnum Import Co. v. De Spoturno Coty, 262 U.S. 159, 67 L. ed. 922, 924;

Southern Power Co. v. North Carolina Public Service Co., supra;

Rice v. **Sioux City Cemetery**, 349 U.S. 70, 99 L. ed. 897, 901.

It is not the province of this Court to review the facts and the evidence at the behest of every dissatisfied litigant. This is a simple tort action between private litigants. The case involves no such important principle of law or great public question as would justify consideration by this Honorable Court. Petitioners merely wish this Court to re-examine the evidence and substitute its judgment for that of the court below.

2. The decision of the Court of Appeals was right.

These are the salient facts:

Each plaintiff is a mother suing for the death of her son. The three young men were riding in an Oldsmobile 88 automobile driven by Beckham, a little after midnight, when the automobile was driven into the side of the 83rd car of a 92 car freight train, where the railroad crossed U. S. Highway No. 25, as the train moved normally from Brunswick to Waycross. Although some fog was shown, one of Petitioners' witnesses who was 150 feet from the crossing without the aid of a light could see the moving cars as they passed over the crossing. Another witness for the Petitioners disproved that there were any obstacles around the crossing that would obscure the cars passing over the crossing. The driver and at least one of the others were familiar with the crossing, having passed over it twice within an hour prior to the accident.

The Court of Appeals Correctly held that the evidence was insufficient to show negligence on the part of the railroad.

The Georgia courts have laid down the rule that some unusual condition must exist at a crossing before an automobile driver will be excused for not seeing a thing as obvious as a standing or moving train. Or, before a railroad is under a legal obligation to give added warning of its presence. The rule is one of common sense—for it holds that no warning need be given to a person of prudence of a thing plainly visible within the range of the statutory headlight requirements.

Savannah Railway v. **Newsome,** 90 Ga. App. 390, 83 S.E. 2d 80;

Mann v. **Central of Georgia Ry. Co.,** 43 Ga. App. 708, 711, 160 S.E. 131;

Atlantic Coast Line Railroad Co. v. **Marshall,** 89 Ga. App. 740, 81 S.E. 2d 228;

Southern Railway Company v. **Riley,** 57 Ga. App. 26, 27, 194 S.E. 422;

Pollard v. **Clifton,** 62 Ga. App. 573, 9 S.E. 2d 782.

In such cases the courts of Georgia uniformly hold that a jury verdict in favor of a plaintiff cannot stand.

Bassett v. **Callaway,** 72 Ga. App. 97, 33 S.E. 2d 112;

Evans v. **Georgia Northern R. Co.,** 78 Ga. App. 709, 52 S.E. 2d 28;

Georgia Northern R. Co. v. Stains, 88 Ga. App. 6, 75 S.E. 2d 833.

The Court of Appeals for the Fifth Circuit reviewed most of these controlling precedents and based its decision squarely on the Georgia law, as it had previously done in other cases arising under the Georgia law.

Driskell v. Powell, 67 F. 2d 484 (CA-5)

Atlantic Coast Line Railroad Co. v. Kammerer, 239 F. 2d 115, 117 (CA-5);

Vassey v. Standard Oil Co., 119 F. 2d 589 (CA-5);

Smith v. Southern Ry. Co., 53 F. 2d 186 (CA-5);

Brown v. Southern Ry. Co., 61 F. 2d 399 (CA-5).

So the Court of Appeals was completely consistent with the Georgia decisions and with its own previous rulings as respects the Georgia law.

The failure of the railroad to swear its train crew raised no presumption of negligence.

The two witnesses nearest to the accident were sworn. The engine crew was 83 cars beyond the crossing, and the rear end crew was 9 cars away. Those witnesses were present at the trial and available to Petitioners, but they chose not to call them.

The Georgia decisions clearly and positively hold that no presumption arose because of the Railroad's failure to go forward with the evidence after Petitioners closed their case.

Southern Express Co. v. B. R. Electric Co., 126 Ga. 472; 55 S.E. 254;

Gammage v. Atlantic & W. P. RR., 97 Ga. 62; 25 S.E. 207;

Davis & Hatcher v. The Central RR., 75 Ga. 645 (3).

Petitioners Can Not Be Aided by the Prima Facie Presumption Statute.

Under a prior statute the Georgia courts held that the presumption created thereby had the effect of evidence and must be considered by the jury throughout the entire trial. In 1928 this Court declared that statute unconstitutional.

Western and Atlantic R. Co. v. Henderson, 279 U. S. 639, 73 L. ed. 884.

In 1929 the Georgia Legislature enacted the so-called prima facie presumption statute (Georgia Code 94-1108), which provides that in actions against railroads for damages, proof of injury by the running of locomotives or cars shall be **prima facie** evidence of want of reasonable care on the part of the railroad. This Georgia statute is in the exact language of a Mississippi statute which was upheld by this Court in

Mobile, J & K C RR. v. Turnipseed, 219 U.S. 35, 55 L. ed. 78,

because it supplied only an inference of negligence "in the absence of other evidence to the contrary".

After the Georgia statute was enacted the Georgia Supreme Court construed it in line with the Turnipseed decision of this Court.

Seaboard Air Line Railway v. **Fountain,** 173 Ga. 593, 160 S.E. 789.

In this proceeding the trial judge assumed that the **prima facie** presumption could not be made to disappear except by evidence of the defendant and that it was necessary for the Railroad to go forward rather than rely upon the evidence introduced by the Petitioners to overcome that statutory inference. This was clearly erroneous.

There was ample evidence "to the contrary" of every allegation of negligence to dispel any "inference" and it makes no difference whether this evidence came from the plaintiffs or defendant.

In **Collier** v. **Pollard,** 60 Ga. App. 105, 2 S.E. 2d 821 (1939), relied upon by Petitioners, it was recognized:

> "* * * Of course, these defensive matters may appear from the plaintiff's own evidence, and if the plaintiff's evidence shows facts which would not authorize a recovery a non suit would be proper.* * *"

In that conventional crossing accident case the judgment of non-suit was reversed, but we are not here confronted with the factual situation present in that case.

Petitioners also rely on **Fowler** v. **Western & Atlantic R. Co.,** 75 Ga. App. 156, 42 S.E. 2d 499 (1947), where the court held:

> "* * * If the plaintiff introduced no evidence tending to support the allegations of negligence contained in the petition, the proof of injury from

the operation of the train would be sufficient to carry the case to the jury **unless the plaintiff's evidence showed non-liability on the part of the defendant as a matter of law.**" And cases cited. (Emphasis supplied)

See also:

"There is no law requiring a railroad company to introduce evidence of its own for the purpose of overcoming the statutory presumption of negligence imposed upon it by law. It may rely solely upon the evidence introduced by the plaintiff, and, if that evidence does remove the presumption, **it is not necessary for the railroad to offer further defense.**" (Emphasis supplied).

Gammage v. **Atlanta & W. P. RR. Co.**, 97 Ga. 62, 25 S.E. 207;

Atlantic Coast Line Railroad Co. v. **Taylor**, 125 Ga. 454, 455, 54 S.E. 622;

Southern Railway v. **Thompson**, 129 Ga. 367, 58 S.E. 1044

It will thus be seen that the court below correctly applied the controlling law of Georgia, and the decision is not in conflict with the decisions of the highest court of that State.

If the prima facie presumption statute of Georgia should be construed as Petitioners would like, then it would be just as unreasonable and unconstitutional as the one struck down by this court in **Western & Atlantic** v. **Henderson**, supra.

CONCLUSION

There are no "special and important" reasons for granting certiorari. A review of all the evidence (which this Court has said it should not be required to do) would only demonstrate that the decision of the Court of Appeals was rightly made in accord with the long standing and consistent rulings of the Georgia court and of the court below.

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CERTIFICATE OF SERVICE

I, Frank G. Kurka, one of the attorneys for the Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day mailed a copy of the foregoing brief to each of the attorneys for the Petitioners, postage prepaid, properly addressed to their regular post office address, as follows:

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